TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 12

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

WILLIAM F. SUDDATH, AS RECEIVER OF THE AMERICAN NATIONAL BANK OF ABILENE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED AUGUST 16, 1907.

(20,830.)

(20,830.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of New York	1	1
Petition for writ of error	1	1
Order for writ of error	2	2
Writ of error	4	2
Clerk's certificate	6	3
Summons	7	4
Complaint	8	5
Answer	15	8
Exhibit A—Agreement	25	14
Extract from the minutes—Trial and verdict	27	15
Judgment	28	15
Bill of exceptions	30	16
Offers by plaintiff, &c	30	16
Plaintiff rests	32	17
Offers by defendant, &c	32	17
Direction for verdict	34	19
Judge's certificate to bill of exceptions	35	19

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	Original.	Print.
Assignment of error	36	19
Bond	37	20
Citation	40	21
Opinion *per curiam*	42	22
Judgment	44	23
Order allowing writ of error	46	23
Petition for writ of error	47	24
Assignment of error	49	24
Bond on writ of error	51	25
Clerk's certificate	55	26
Citation	56	27
Acceptance of service of citation	57	27
Writ of error	58	27
Acceptance of service of writ of error	60	28

a United States Circuit Court of Appeals for the Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff in Error, (Defendant below,)
vs.
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant in Error, (Plaintiff below.)

Transcript of Record.

Error to the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Jan. 5, 1907. William Parkin, Clerk.

1 United States Circuit Court, Southern District of New York.

WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene, Plaintiff,
against
THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Defendant.

Petition for Writ of Error.

The first day of December, 1906, came the defendant by its attorney and filed herein and presented to the Court, its petition praying for the allowance of a Writ of Error and an assignment of errors intended to be urged by it and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit and that such further proceedings may be had as may be proper in the premises.

And on consideration whereof, the Court does allow the Writ of Error, upon the defendant giving bond according to law in the sum of $7,500, which shall operate as a supersedeas bond.

E. HENRY LACOMBE,
U. S. Circuit Judge.

2 *Order for Writ of Error.*

United States Circuit Court, Southern District of New York.

WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene, Plaintiff,
against
THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

And now comes The Hanover National Bank of the City of New York, defendant herein, and says that on or about the first day of December, 1906, this Court entered judgment herein in favor of the plaintiff against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed herewith.

Wherefore this defendant prays that a Writ of Error may issue in its behalf out of the United States Circuit Court of Appeals for the Second Circuit, for the correction of the error so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals for the Second Circuit.

Dated, December 1st, 1906.

PERCY S. DUDLEY,
Attorney for Defendant.

3 (Endorsed:) United States Circuit Court, Southern District of New York.—William F. Suddath, as Receiver of the American National Bank of Abilene, Plaintiff, against The Hanover National Bank of the City of New York, Defendant.—Petition and order allowing writ of Error.—Percy S. Dudley, Attorney for Defendant, 26 Liberty Street, New York City.—Copy received. Dated December 6th, 1906. Edward B. Whitney, Attorney for Plaintiff. U. S. Circuit Court, Southern District New York, Filed Dec. 6, 1906. —John A. Shields, Clerk.

4 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States, for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between William F. Suddath, as Receiver of the American National Bank of Abilene, plaintiff, and The Hanover National Bank of the City of New York, defendant, a manifest error hath happened, to the great damage of said The Hanover National

Bank of the City of New York, defendant, as is said and appears by its complaint; We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the second day of January, 1907, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice
5 of the United States, this fourth day of December, in the year of Our Lord, one thousand nine hundred and six, and of the Independence of the United States, the one hundred and thirty-first.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court of Appeals, for the Second Circuit.—The Hanover National Bank of the City of New York, Plaintiff in Error, against William F. Suddath, as Receiver of the American National Bank of Abilene, Defendant in Error.—Writ of Error.—Percy S. Dudley, Attorney for Plaintiff in Error, 26 Liberty Street, Borough of Manhattan, New York City.—Copy received this 5th day of December, 1906. Edward B. Whitney, Attorney for Defendant in Error.—U. S. Circuit Court, Southern District New York, Filed Dec. 6, 1906, John A. Shields, Clerk.

6 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from one to forty-one inclusive, contains a true and complete transcript of the record and proceedings had in said Court in the cause of

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff in Error,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant in Error,

as the same remain of record and on file in said office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this — day of January in the year of our Lord, one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

J. A. SHIELDS, *Clerk.*

7 *Summons.*

United States Circuit Court, Southern District of New York.

RICHARD L. VAN ZANDT, as Receiver of the American National Bank of Abilene,
against
HANOVER NATIONAL BANK.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this seventh day of April, in the year one thousand nine hundred and five.

(Sd.) JOHN A. SHIELDS, *Clerk.*

EDWARD B. WHITNEY,
Plaintiff's Attorney.

Office and Post Office Address, 49 Wall Street, Borough of Manhattan, New York City.

8 *Complaint.*

United States Circuit Court, Southern District of New York.

RICHARD L. VAN ZANDT, as Receiver of the American National Bank of Abilene, Plaintiff,
against
HANOVER NATIONAL BANK, Defendant.

The plaintiff above-named complains by direction of the Comptroller of the Currency of the United States, of the defendant above-named as follows, upon information and belief:

I. The defendant is and at all the times hereinafter mentioned has been a National Banking Association organized and incorporated under the Revised Statutes of the United States and carrying on the business of banking in the Southern District of New York.

II. The American National Bank of Abilene, above named, was a National Banking Association organized and incorporated under the Revised Statutes of the United States and carrying on the business of banking at the City of Abilene in the State of Texas at the times hereinafter mentioned and until on or shortly before January 18, 1905, when it closed its doors and then and there suspended and discontinued its business and has not since resumed the same.

9 III. On said January 18, 1905, the Comptroller of the Currency of the United States, having become satisfied of the insolvency of the said bank, did under the authority of the Revised Statutes of the United States appoint the above-named plaintiff Receiver of said American National Bank of Abilene by certificate under his hand and official seal, dated on that day; and said Receiver thereafter duly qualified according to law and entered upon the duties of his trust and has since continued in the discharge of the same.

IV. On or about December 16, 1904, R. H. Logan and W. R. Logan made and delivered to The American National Bank of Abilene, their promissory note dated on said day, whereby for value received, they or either of them promised to pay to the order of said bank at said bank, ninety days after said date, waiving grace, the sum of Three thousand dollars ($3,000) together with ten per cent. interest per annum thereon from maturity until paid.

V. Thereafter and on or about January 4, 1905, the said American National Bank of Abilene endorsed said note and sent the same to the defendant with a request that the defendant discount the same and for no other purpose; and said note and request thereafter and on or about January 9, 1905, reached the defendant. Defendant thereafter refused to discount said note, but did not return the same, and it remained in defendant's hands at the time of the appointment of the plaintiff as Receiver as aforesaid.

VI. Thereafter and on or about February 8, 1905, the plaintiff as Receiver of The American National Bank of Abilene demanded

of the defendant the return of said note and the defendant has failed to return the same.

VII. The plaintiff as such Receiver was the owner of said note at the time of said demand and of the maturity of said note
10 and entitled to the immediate possession thereof. Said note at the time of its maturity, to wit, March 16, 1905, was of the value of Three thousand dollars ($3,000) and from that time forward has been and continues to be until paid, of the additional value of ten per cent. per annum upon said amount from said date.

For a Second and Separate Cause of Action:

VIII. The allegations of paragraphs I, II and III hereof are true and are hereby repeated as a part of this cause of action.

IX. On or about January 9 1905, Hayden Grocery Co. and George Hayden made and delivered to The American National Bank of Abilene, their promissory note dated on January 14 of that year whereby for value received, they or either of them promised to pay to the order of said bank at said bank, sixty days after said date, waiving grace, the sum of Two thousand dollars ($2,000) together with ten per cent. interest per annum thereon from maturity until paid.

X. Thereafter and on or about January 9, 1905, the said American National Bank of Abilene endorsed said note and sent the same to the defendant with a request that the defendant discount the same and for no other purpose; and said note and request thereafter and on or about January 13, 1905, reached the defendant. Defendant thereafter refused to discount said note, but did not return the same, and it remained in Defendants hands at the time of the appointment of the plaintiff as Receiver as aforesaid.

XI. Thereafter and on or about February 8, 1905, the plaintiff as Receiver of The American National Bank of Abilene demanded of the defendant the return of said note and the defendant
11 has failed to return the same.

XII. The plaintiff as such Receiver was the owner of said note at the time of said demand and of the maturity of said note and entitled to the immediate possession thereof. Said note at the time of its maturity, to wit, March 15, 1905, was of the value of Two thousand dollars ($2,000) and from that time forward has been and continues to be until paid, of the additional value of ten per cent. per annum upon said amount from said date.

For a Third and Separate Cause of Action:

XIII. The allegations of paragraphs I, II and III hereof are true and are hereby repeated as a part of this cause of action.

XIV. On or about December 28, 1904, C. B. & W. F. Scarborough made and delivered to The American National Bank of Abilene, their promissory note dated on said day, whereby for value received, they or either of them promised to pay to the order of said bank at said bank, six months after said date, waiving grace, the sum of One thousand five hundred dollars ($1,500) together with ten per cent. interest per annum thereon from maturity until paid.

XV. Thereafter and on or about January 12, 1905, the said American National Bank of Abilene endorsed said note and sent the same

to the defendant with a request that the defendant discount the same and for no other purpose; and said note and request thereafter and on or about January 16, 1905, reached the defendant. Defendant thereafter refused to discount said note, but did not return the same, and it remained in defendant's hands at the time of the appointment of the plaintiff as Receiver as aforesaid.

12 XVI. Thereafter and on or about February 8, 1905, the plaintiff as Receiver of The American National Bank of Abilene demanded of the defendant the return of said note and the defendant has failed to return the same.

XVII. The plaintiff as such Receiver was the owner of said note at the time of said demand and of the maturity of said note and entitled to the immediate possession thereof. Said note is of the value of One thousand five hundred dollars ($1,500), less interest until maturity.

For a fourth and separate cause of action:

XVIII. The allegations of paragraph- I, II and III hereof are true and are hereby repeated as a part of this cause of action.

XIX. On or about January 10, 1905, L. W. Hollis made and delivered to The American National Bank of Abilene, his promissory note dated on said day, whereby for value received he promised to pay to the order of said bank thirty days after said date, waiving grace, the sum of Three thousand five hundred dollars ($3,500) together with ten per cent. interest per annum thereon from maturity until paid.

XX. Thereafter and on or about January 12, 1905, the said American National Bank of Abilene endorsed said note and sent the same to the defendant with a request that the defendant discount the same and for no other purpose; and said note and request thereafter and on or about January 16, 1905, reached the defendant. Defendant thereafter refused to discount said note, but did not return the same, and it remained in defendant's hands at the time of the appointment of the plaintiff as Receiver as aforesaid.

XXI. Thereafter and on or about February 8, 1905, the
13 plaintiff as Receiver of The American National Bank of Abilene demanded of the defendant the return of said note and the defendant has failed to return the same.

XXII. The plaintiff as such Receiver was the owner of said note at the time of said demand and of the maturity of said note and entitled to the immediate possession thereof. Said note at the time of its maturity, to wit, February 9, 1905, was of the value of Three thousand five hundred dollars, ($3,500) and from that time forward has been and continues to be until paid, of the additional value of ten per cent. per annum upon said amount from said date.

Wherefore, the plaintiff demands judgment against the defendant for the possession of the four promissory notes aforesaid, or in case possession thereof cannot be given to plaintiff, for the sum of Ten thousand dollars ($10,000), together with interest upon Three thousand five hundred dollars ($3,500) at the rate of ten per cent. per annum from February 9, 1905, and upon Two thousand dollars ($2,000) at said rate from March 15, 1905, and upon Three thou-

sand dollars ($3,000) at said rate from March 16 1905, and upon One thousand five hundred dollars ($1,500) at said rate from June 28, 1905, if delivered or payment by defendant to plaintiff shall not have been made before that date, together with the costs of this action.

EDWARD B. WHITNEY,
Plaintiff's Attorney.

STATE OF NEW YORK, *County of New York, ss:*

Edward B. Whitney being duly sworn, says, I am the attorney for the plaintiff herein. The foregoing complaint is true to my knowledge except as to the matters therein stated to be alleged
14 on information and belief and as to those matters I believe it to be true. The grounds of my belief as to the matters therein not stated upon knowledge are correspondence and copies of correspondence and papers and other information received as said attorney from the plaintiff. The reason why this verification is not made by said plaintiff is that said plaintiff is not within the County or State of New York where deponent resides and has his office.

EDWARD B. WHITNEY.

Sworn to before me this 7th day of April, 1905.
[SEAL.] EDWARD S. FRITH,
Notary Public, No. 90, Kings Co.

Certificate filed in New York Co.

15 *Answer.*

United States Circuit Court, Southern District of New York.

RICHARD L. VAN ZANDT, as Receiver of the American National Bank of Abilene, Plaintiff,
against
THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

The defendant above-named, by its attorney, Percy S. Dudley, answering the complaint of the plaintiff herein.

As to the first cause of action:

I. Denies upon information and belief, the allegations contained in the sub-division of the complaint numbered V and VII, except that it admits that on or about January 10th, 1905, the said American National Bank of Abilene endorsed the note of R. H. Logan and W. R. Logan for $3,000 therein referred to, and sent the same to the defendant for discount and credit, and that said note and letter accompanying the same reached the defendant on or about January 14th, 1905; that the defendant thereupon refused to discount said note, but did not return the same, and that it remained in the defendant's hands at the time of the appointment of the plaintiff as

receiver as therein stated; and except that it alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations in said sub-division VII, that said note, at the time of its maturity on March 16th, 1905, was of the value
16 of $3,000, and from that time forward has been and continues to be until paid, of the additional value of ten per cent. per annum upon said amount from said date.

As to the second cause of action:

II. Denies upon information and belief, the allegations contained in the sub-division of the complaint numbered X and XII, except that it admits the allegations contained in said sub-division X, that on or about January 9th, 1905, the American National Bank of Abilene endorsed the note of the Hayden Grocery Company and George Hayden for $2,000 therein referred to, and sent the same to the defendant for discount and credit, and that said note and letter accompanying the same reached the defendant on or about January 14th, 1905; that the defendant thereupon refused to discount said note, but did not return the same, and that it remained in the defendant's hands at the time of the appointment of the plaintiff as receiver as therein stated; and except that it alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegation in said sub-division XII, that said note at the time of its maturity on March 15th, 1905, was of the value of $2,000 and from that time forward has been and continues to be until paid, of the additional value of ten per cent. per annum upon said amount from said date.

As to third cause of action:

III. Denies upon information and belief, the allegations contained in the sub-division of the complaint numbered XV and XVII, except that it admits the allegations contained in said sub-division XV, that on or about January 12th, 1905, said American National Bank of Abilene endorsed the note of C. B. and W. F. Scarborough for $1,500 therein referred to, and sent the same to
17 the defendant for discount and credit, and that said note and letter accompanying the same reached the defendant on or about January 16th, 1905; that the defendant thereupon refused to discount said note, but did not return the same, and that it remained in the defendant's hands at the time of the appointment of the plaintiff as receiver as therein stated, and except that it admits the allegation contained in said sub-division numbered XVII, that said note was of the value of $1,500 at the maturity thereof.

As to the fourth cause of action:

IV. Denies upon information and belief, the allegations contained in the sub-divisions of the complaint numbered XX and XXII, except that it admits the allegations contained in said sub-division numbered XX, that on or about January 12th, 1905, said American National Bank of Abilene endorsed the note of L. W. Hollis for $3,500 therein referred to, and sent the same to the defendant for discount and credit, and that the said note and letter accompanying the same reached the defendant on or about January 16th, 1905; that the defendant thereupon refused to discount said note, but did not

return the same, and that it remained in the defendant's hands at the time of the appointment of the plaintiff as receiver as therein stated; and except that it alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in said sub-division numbered XXII, that said note, at the time of its maturity on February 9th, 1905, was of the value of $3,500, and from that time forward has been and continues to be until paid, of the additional value of ten per cent. per annum upon said amount from said date.

And further answering said complaint, and for a second and separate defense, set-off and counter-claim to the First, Second,
18 Third and Fourth Causes of Action therein set forth.

V. Alleges upon information and belief, that for upwards of a year prior to January, 1905, the American National Bank of Abilene, a banking corporation located at Abilene, Texas, was a correspondent of this defendant, and kept with this defendant a deposit account, depositing therein sundry sums of money which were placed to its credit without distinction and withdrawing the same by checks, bills of exchange, or other obligations in writing, payable at the defendant's place of business, to the order of various persons and corporations, in the ordinary course of business, which were duly paid by this defendant; and that, from time to time, the said American National Bank of Abilene forwarded to the defendant notes or commercial paper made by various persons and owned by said American National Bank, endorsing said paper and offering it to this defendant for sale, with the request that in case this defendant should buy said notes or commercial paper, the proceeds thereof should be deposited to the credit of said American National Bank of Abilene in its said deposit account with this defendant.

VI. Alleges upon information and belief, that on or about November 27th, 1903, the said American National Bank of Abilene entered into an agreement in writing with this defendant, a copy of which is hereto annexed marked "A," wherein and whereby it agreed that all bills of exchange, notes, checks and the proceeds thereof, and all other securities, money and property of every kind owned by said American National Bank, or in which it had any interest, deposited with this defendant, or thereafter to be deposited with this defendant, or which might be in any wise in this defendant bank or under its
control, as collateral security for loans or advances already
19 made or thereafter to be made, to or for account of said American National Bank, by this defendant bank, or otherwise, might be held, collected and retained by this defendant bank, until all liabilities, present or future, of said American National Bank, due or not due, of every kind to this defendant, then or thereafter contracted, should be paid and fully satisfied, as by said agreement more fully appears.

VII. Alleges upon information and belief, that on or about January 14th, 1905, this defendant received from said American National Bank, the note of R. H. Logan, and W. R. Logan for $3,000 referred to in said first cause of action, endorsed by said American National Bank, with a letter accompanying the same offering said

note for sale to this defendant, with the request that if said note were purchased by this defendant, its proceeds should be deposited to the credit of said American National Bank in its deposit account with this defendant; that on or about January 14th, 1905, this defendant also received from said American National Bank, the note of the Hayden Grocery Company for $2,000 referred to in said second cause of action, endorsed by said American National Bank, with a letter accompanying the same offering said note for sale to this defendant, with the request that if said note were purchased by this defendant, its proceeds should be deposited to the credit of said American National Bank in its deposit account with this defendant; that thereupon, on January 14th, 1905, this defendant notified said American National Bank by telegraph that it declined to purchase such notes, and this defendant thereupon held said notes awaiting a further communication from said American National Bank; that on or about January 16th, 1905, this defendant also received from said American National Bank, a note of C. B. & W. F. Scar-
20 borough for $1,500 referred to in said third cause of action, and a note of L. W. Hollis for $3,500 referred to in said fourth cause of action, both endorsed by said American National Bank, with a letter accompanying the same offering said notes for sale to this defendant, with the request that if said notes were purchased by this defendant, their proceeds should be deposited to the credit of said American National Bank in its deposit account with this defendant; that thereupon, on January 16th, 1905, this defendant notified said American National Bank by telegraph that it declined to purchase said notes, and this defendant thereupon held said notes awaiting a further communication from said American National Bank; that in reply to said telegrams, the American National Bank, on January 16th, 1905, wrote this defendant that if it declined to purchase the notes forwarded as aforesaid, the American National Bank would send its own obligation, to which the notes so forwarded would be attached as collateral security if this defendant so preferred; that on January 17th, 1905, this defendant had in its hands, besides the notes above referred to, the following notes purchased by this defendant from said American National Bank and endorsed by it, viz: D. G. Hill for $1,100, due January 18, 1905; George L. Paxton, for $2,000, due February 14, 1905; J. H. Parramore for $2,000, due March 9, 1905; C. W. Merchant & Sons, for $7,000, due April 2nd, 1905, and Continental Oil & Cotton Co., for $5,000, due May 9, 1905; that on said January 17th, 1905, checks or other obligations of said American National Bank drawn on this defendant, were presented to this defendant for payment and were paid, so that at the close of business on that day, the account of said American National Bank with this defendant was overdrawn to the amount of $3,563.86; that is, this defendant, on said date, advanced to and paid out for the account of said Ameri-
21 can National Bank, $3,563.86 in excess of any amount then standing to the credit of said American National Bank in its deposit account with this defendant.

VIII. Alleges upon information and belief, that this defendant

advanced and paid out said moneys to or for the account of said American National Bank in reliance upon said four notes referred to in the complaint herein, pledged to it by and under the terms of said agreement dated November 27, 1903, above referred to.

IX. Alleges upon information and belief, that this defendant carried said advance of $3,563.86 upon its books by making a temporary loan of $3,500 to said American National Bank, and by carrying the balance of $63.86 as an overdraft upon the said deposit account of the American National Bank; that on July 18th, 1905, this defendant received from said American National Bank a remittance of $27.50, and on January 20, 1905, a remittance of $205.41, which this defendant applied in reduction of said overdraft, leaving a balance in said deposit account to the credit of said American National Bank of $169.05; that thereafter, this defendant incurred expenses for express charges, exchange, and insurance in collecting the rediscounted notes held by it, amounting to $13.25, which left a net balance in said deposit account to the credit of the American National Bank of $155.80, which this defendant has applied in reduction of the indebtedness of said American National Bank to it.

X. Alleges upon information and belief, that at maturity, all said notes of D. G. Hill, George L. Paxton, J. H. Parramore, C. W. Merchant & Sons, and Continental Oil & Cotton Company, above referred to, were paid, and the contingent liability of said American National Bank as endorser thereon was thereby extinguished; but that
22 no part of said advance or loan of $3,500 on January 17th, 1905, was paid by said American National Bank, or by the plaintiff herein, as its receiver, and at the time that the plaintiff herein made demand for the return of said notes as set forth in the complaint herein, this defendant held said notes as collateral security for the payment of said indebtedness of $3,500, pursuant to said agreement dated November 27, 1903, and was then, and at all times since has been willing to surrender said notes upon payment of the indebtedness of said American National Bank to it.

XI. Upon information and belief, that on June 9, 1905, the note of the Hayden Grocery Company for $2,000 referred to in said second cause of action was collected by this defendant less a certain offset allowed by agreement with the plaintiff for moneys of said Hayden Grocery Company on deposit with said American National Bank at the time of its failure, the net proceeds thereof being $1,815.83, and that on July 3, 1905, said note of C. B. & W. F. Scarborough for $1,500 was collected by this defendant in full, which amounts, together with the balance of deposit account above referred to, amounting to $155.80, making a total of $3,471.63 were applied in reduction of said advance or loan of $3,500, leaving a balance of $28.37 due to this defendant, no part of which has since been paid, that the remaining notes of R. H. & W. R. Logan, referred to in said first cause of action and of L. W. Hollis, referred to in said fourth cause of action, were not paid at maturity and this defendant thereupon instituted suit against the makers thereof, in courts of proper jurisdiction in the State of Texas, to enforce the collection thereof and that said suits are now pending and undetermined; that the

defendant has offered, and hereby again offers, to deliver said notes and assign all its rights of action thereon to the plaintiff upon
23 payment of the balance of the indebtedness of said American National Bank due to it.

And further answering said complaint, and for a third and separate defense, set-off and counter-claim to the first, second, third and fourth causes of action therein set forth:

XII. Alleges upon information and belief that on or about January 17th, 1905, and prior to the appointment of this plaintiff as receiver of said American National Bank, this defendant loaned and advanced to said American National Bank, the sum of $3,500 on demand, and that at the time of the appointment of the plaintiff as such receiver, said sum of $3,500 and interest was immediately due and payable to this defendant; and that at the time of making said loan, this defendant had in its posses-ion four certain notes more fully described in the first, second, third and fourth causes of action herein respectively upon which it claimed a banker's lien by virtue of which it then retained, and has since retained, said notes or the proceeds thereof until the payment of said indebtedness of the American National Bank to it.

XIII. Upon information and belief, that on June 9, 1905, the note of the Hayden Grocery Company for $2,000 referred to in said second cause of action was collected by this defendant, less a certain offset allowed by agreement with the plaintiff for moneys of said Hayden Grocery Company on deposit with said American National Bank at the time of its failure, the net proceeds thereof being $1,815.83; and that on July 3rd, 1905, said note of C. B. & W. F. Scarborough for $1,500 was collected by this defendant in full, which amount, together with a balance of a deposit account amounting to $155.80, making a total of $3,471.63, were applied in reduction of said loan of $3,500, leaving a balance of $28.37 due this defendant, no part of which has since been paid; that the re-
24 maining notes of R. H. & W. R. Logan referred to — said first cause of action, and of L. W. Hollis referred to in said fourth cause of action were not paid at maturity and this defendant thereupon instituted suit against the makers thereof in courts of proper jurisdiction in the State of Texas, to enforce the collection thereof, and that said suits are now pending and undetermined; that this defendant has no knowledge or information sufficient to form a belief as to the value of said notes; but that the defendant has offered, and hereby again offers to deliver said notes and assign all its rights of action thereon to the plaintiff upon payment of a balance of the indebtedness of said American National Bank due to it.

Wherefore, this defendant prays judgment that the complaint herein be dismissed with costs.

PERCY S. DUDLEY,
Attorney for Defendant, 26 Liberty Street,
Borough of Manhattan, New York City.

CITY AND COUNTY OF NEW YORK:

Elmer E. Whittaker, being duly sworn, says that he is the Cashier of The Hanover National Bank of the City of New York, the defendant in the above entitled action. That the foregoing answer is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ELMER E. WHITTAKER.

Sworn to before me this 25th day of September, 1905.

JACOB NIEMAN,
Notary Public, N. Y. Co.

25 "A."

ABILENE, TEXAS, *Nov. 27th*, 1903.

For and in consideration of one dollar to us in hand paid by The Hanover National Bank of the City of New York the receipt whereof is hereby acknowledged, and for other considerations received from said Bank, the undersigned agree with said Bank that all Bills of Exchange, Notes, Checks, and the proceeds thereof, and all other securities, money and property of every kind owned by the undersigned, or either or any of them, or in which they, or any or either of them have any interest deposited with said Bank, or which may be

or which may hereafter be deposited with said Bank

[illegible] collected and retained by said Bank, until all liabilities present or future of the undersigned, or any or either of them, due or not due, of every kind to said Bank, now or hereafter contracted, shall be paid and fully satisfied, and that whenever any of such indebtedness or liabilities are due and unpaid, said Bank may, in the discretion of its President or Cashier, or either of them, upon one day's notice to the undersigned, sell said Bills, Notes or Securities, or other property, or any part thereof, at public or private sale; or may, without notice, discount the same or in the discretion of the President or Cashier of said Bank, or either of them, may compound, compromise, settle, assign and convey, manage, and turn the same into cash according to opportunity, and apply proceeds, after deducting all expenses (legal or otherwise) of sale or collection, to the payment of any or all such indebtedness or liabilities, so due or unpaid, or may without such sale, apply enough of such money or property to satisfy
26 such indebtedness or liabilities, and retain the residue of such proceeds or property so sold, and of the property unsold, until all other liabilities and indebtedness of the undersigned to said Bank, due or not due, are paid and fully sat-sfied.

THE AMERICAN NAT'L BANK,
By J. G. LOWDON, *Pt.*

27 *Extract from the Minutes.*

At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on Tuesday, the 20th day of November, in the year of our Lord one thousand nine hundred and six.

Present: The Honorable Charles M. Hough, Judge.

WILLIAM F. SUDDATH, as Receiver of the American National Bank,
vs.
HANOVER NATIONAL BANK.

Now comes the plaintiff, by Edward B. Whitney, Esq., his attorney, and moves the trial of this cause. Likewise comes the defendant, by Percy S. Dudley, Esq., its attorney. Thereupon a jury is impaneled and the cause proceeds to trial.

After hearing the arguments of counsel for the respective parties, the Court directs the jury to find a verdict in favor of the plaintiff for $3,725.86/100. An extract from the minutes.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

28 *Judgment.*

United States Circuit Court, Southern District of New York.

WILLIAM F. SUDDATH, as Receiver of the American National Bank,
Plaintiff,
against
HANOVER NATIONAL BANK, Defendant.

The above entitled action having come on for trial on a regular call of the calendar of said Court, at a session thereof held by the Honorable Charles M. Hough, District Judge, and a jury, on the 20th day of November, 1906, in the United States Court and Post Office Building, in the City of New York, and said Court having directed a verdict in favor of the plaintiff, and having ordered that judgment should be entered in said action in favor of the plaintiff against the defendant for the sum of three thousand seven hundred and twenty-five 86/100 dollars ($3,725.86/100) together with the costs of said action, and said costs having been adjusted at the sum of seventy-six 43/100 dollars ($76.43/100),

Now, on motion of Edward B. Whitney, attorney for the plaintiff, it is

Ordered, adjudged and decreed, that the plaintiff, William F. Suddath, as Receiver of The American National Bank, have judgment against the said defendant upon the issues in said action, with

Said letter is as follows:

33 "Your letter of the 12th instant, with enclosures, is at hand, and we have just wired you:

"'Letter 12th received. Not satisfactory.'

"We are not discounting the enclosures for you but hold same as collateral to your indebtedness to us, and remain."

Defendant further puts in evidence a telegram dated January 17, 1905, from the defendant to the American National Bank, reading as follows:

"Sent you two telegrams January fourteenth. Telegraph us what you have done."

Defendant further puts in evidence a transcript of the account of the American National Bank with the Hanover National Bank from January 17, 1905, to January 19, 1905. This account shows a balance to the credit of the American National Bank on the morning of January 17th in the amount of $616.15, a charge of six items, the largest of which is $3,825.45, amounting in all to $4,192.01, and on the credit side a loan of $3,500 on January 17th, together with two small items resulting in a debit balance on the morning of January 18th of $63.86. On January 14th, 1905, there were outstanding certain rediscounted notes, which have since been paid, as stated in paragraphs VII. and X. of the answer.

In connection therewith plaintiff's counsel puts in evidence the original voucher for the item of $3,825.45 on said account, being a check drawn on the defendant by the American National Bank on January 11, 1905, to the order of the New York Life Insurance Company, the amount whereof was paid by the defendant on January 17, 1905, through the Clearing House.

Defendant further puts in evidence a letter dated January 17, 1905, from itself to the American National Bank.

Said letter is as follows:

"As your account showed overdrawn to-day over $3,000,

34 we have made you a temporary loan of $3,500 against collateral in our hands."

Defendant's counsel further puts in evidence a letter dated January 16, 1905, from the American National Bank to defendant, defendant's counsel admitting that this letter was not received until after the failure.

Said letter is as follows:

"We have just received your wire. The rediscounts we sent you were mostly renewals and in every instance 'good as gold.'

"Since the drop in cotton, collections are at a standstill, and our clients expect us to stay with them, and we are obliged to ask the same indulgence from our correspondents.

"Should you prefer, we will send our B/P with collaterals attached.

"'We trust you will accord us the leniency asked for."

It is admitted by the plaintiff, subject to all legal exceptions, except the objection that the witness is not personally present, that Mr. Woodward, the vice-president of the defendant, would testify, if present, that when the checks causing the overdraft of January 17, 1905, were presented for payment and called to his attention

he got out the agreement, a copy whereof is annexed to the answer, looked at it, and believed that he had a right to hold these four notes as collateral; that he relied upon the four notes and whatever rights he would have in regard to them by collateral agreement or otherwise, when allowing the overdraft.

It is admitted that the American National Bank closed its doors on January 18, 1905.

The testimony being thereupon closed, the Court directed a verdict in favor of the plaintiff for $3,725.86, and defendant excepted to the direction of such verdict.

35 The jury thereupon rendered a verdict in favor of the plaintiff for three thousand seven hundred and twenty-five and 86/100 dollars as directed.

Upon application of the defendant, this bill of exceptions, having been duly settled according to the provisions of Rule 69 of this Court, is allowed by me and ordered to become a part of the record of this cause at the trial aforesaid.

CHARLES M. HOUGH, *U. S. J.*

Approved.

EDWARD B. WHITNEY,
Attorney and of Counsel for Plaintiff.
PERCY S. DUDLEY,
Attorney and of Counsel for Defendant.

(Endorsed:) United States Circuit Court, Southern District of New York.—William F. Suddath, as Receiver of The Hanover National Bank of the City of New York, Defendant.—Bill of exceptions.—Percy S. Dudley, Attorney for Defendant, 26 Liberty St., Borough of Manhattan, New York City.—U. S. Circuit Court, Southern District New York, Filed Dec. 4, 1906, John A. Shields, Clerk.

36 *Assignment of Errors.*

United States Circuit Court, Southern District of New York.

WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene, Plaintiff,
against
THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

And afterwards, to wit, at the same term at which the above entitled cause was tried and judgment therein rendered, comes the defendant aforesaid and says that in the record and proceedings in the above entitled cause, there is manifest error in the following ruling of the Court, to wit:

In the direction of a verdict in favor of the plaintiff.

Wherefore, defendant prays that the judgment entered herein be reversed, and a new trial of the above entitled cause granted.

Dated New York, November 30th, 1906.

PERCY S. DUDLEY,
Attorney for Defendant.

(Endorsed:) United States Circuit Court, Southern District of New York.—William F. Suddath, as Receiver of the American National Bank of Abilene, Kansas, Plaintiff, against The Hanover National Bank of the City of New York, Defendant.—Assignment of errors.—Percy S. Dudley, Attorney for Defendant, 26 Liberty Street, Borough of Manhattan, New York City.—U. S. Circuit Court, Southern District New York, Filed Dec. 4, 1906, John A. Shields, Clerk.

37 *Bond.*

United States Circuit Court, Southern District of New York

WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene, Plaintiff,
against
THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Defendant.

Know all men by these presents, that we, The Hanover National Bank of the City of New York, as principal, and Henry R. Carse, as surety, are held and firmly bound unto William F. Suddath, as Receiver of the American National Bank of Abilene, plaintiff above named, in the sum of seventy-five hundred dollars ($7,500), to be paid to the said receiver, or his successor, which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors representatives and assigns firmly by these presents.

Signed with our seals and dated the first day of December, 1906.

Whereas, the above-named defendant, The Hanover National Bank of the City of New York, has sued out a Writ of Error to the United States Circuit Court of Appeals, for the Second Circuit, to reverse the judgment in the above entitled cause by the Circuit Court of the United States for the Southern District of New York;

Now Therefore, the condition of this obligation is such
38 that if the above-named, The Hanover National Bank of the City of New York shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE HANOVER NATIONAL BANK
OF THE CITY OF NEW YORK,
[SEAL.] By ELMER E. WHITTAKER, *Cashier.*
[SEAL.] HENRY R. CARSE.

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this first day of December, in the year one thousand nine hundred and six, before me personally came Elmer E. Whittaker, to me known, who, being by me duly sworn, did depose and say: That he resided in the City of New York; that he is the Cashier of

The Hanover National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JACOB NIEMAN,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this first day of December, nineteen hundred and six, before me personally came Henry R. Carse, to me personally known and known to me to be the same person described in and who
39 executed the foregoing instrument, and duly acknowledged to me that he executed the same.

JACOB NIEMAN,
Notary Public, N. Y. Co.

Form and sufficiency of the foregoing bond and approval thereof consented to.

EDWARD B. WHITNEY,
Attorney for Plaintiff.

(Endorsed:) United States Circuit Court, Southern District of New York.—William F. Suddath, as Receiver of the American National Bank of Abilene, Plaintiff, against The Hanover National Bank of the City of New York, Defendant.—Bond.—Percy S. Dudley, Attorney for Hanover National Bank, 26 Liberty St., New York City.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the plaintiff of the right at any time to examine the proper surety under oath, as to its assets, liabilities and financial condition generally. E. H. Lecombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District New York, Filed Dec. 4, 1906, John A. Shields, Clerk.

40 *Citation.*

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To William F. Suddath, as Receiver of the American National Bank of Abilene, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the second day of January, 1907, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein The Hanover National Bank of the City of New York

is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 4th day of December, in the year of our Lord one thousand nine hundred and six, and of the Independence of these United States the one hundred and thirty-first.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

41 (Endorsed:) United States Circuit Court of Appeals, For the Second Circuit.—The Hanover National Bank, &c., Plaintiff in Error, *vs.* William F. Suddath, as Receiver, &c., Deft. in Error.—Citation.—Copy received December 5, 1906. Edward B. Whitney, Atty. for Deft. in Error.—U. S. Circuit Court, Southern District New York, Filed Dec. 6, 1906, John A. Shields, Clerk.

42 United States Circuit Court of Appeals for the Second Circuit.

No. 264, October Term, 1906.

Argued April 12, 1907; Decided April 30, 1907.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff in Error, (Defendant below),

vs.

WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant in Error, (Plaintiff Below).

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend and Coxe.

On writ of error to review a judgment for $3,802.29, entered in the Circuit Court for the Southern District of New York, upon a verdict directed by the court in favor of defendant in error, who was plaintiff below.

Per Curiam:

This action was before us upon a previous writ of error. (*Van Zandt v. The Hanover Nat. Bank* (149 *Fed. Rep.* 127).

The present record, *mutatis-mutandis*, is identical with that on the former review. The only differences relate to immaterial changes occasioned by the lapse of time. The facts
43 are the same and no reason has been advanced which induces us to change our view of the law.

The judgment is affirmed.

Percy S. Dudley, for the Plaintiff in Error.
Edward B. Whitney, for the Defendant in Error.

44 At a stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 10th day of May one thousand nine hundred and seven.

Present: Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

HANOVER NATIONAL BANK, Plaintiff in Error,
vs.
WILLIAM F. SUDDATH, as Receiver, etc., Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. K. T.
A. C. C.

45 Endorsed: United States Circuit Court of Appeals Second Circuit. Hanover Bank *vs.* Suddath. Order for Mandate. United States Circuit Court of Appeals Second Circuit Filed May 10, 1907. William Parkin, Clerk.

46 United States Circuit Court of Appeals for the Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff in Error (Defendant Below),
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant in Error (Plaintiff Below).

Petition for Writ of Error.

The twenty-ninth day of July, 1907, came the plaintiff in error by its attorney and filed herein and presented to the Court, its petition praying for the allowance of a Writ of Error and an assignment of errors intended to be urged by it, and praying also that a transcript of the record and proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such further proceedings may be had as may be proper in the premises.

And on consideration whereof, the Court does allow the Writ of Error, upon the defendant giving bond according to law in the sum of $7,500, which shall operate as a supersedeas bond.

ALFRED C. COXE,
U. S. Cir. Judge.

47 United States Circuit Court of Appeals for the Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff in Error (Defendant Below),
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant in Error (Plaintiff Below).

And now comes, The Hanover National Bank of the City of New York, plaintiff in error herein and says that on or about the tenth day of May, 1906, this Court entered judgment herein, affirming a judgment of the Circuit Court for the Southern District of New York, in favor of the defendant in error against this plaintiff in error, in which judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed herewith.

Wherefore this plaintiff in error prays that a Writ of Error may issue in its behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated, July 29, 1907.

PERCY S. DUDLEY,
Attorney for Plaintiff in Error.

48 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Plaintiff in Error, (Defendant below), against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant in Error, (Plaintiff below). Copy. Petition and Order Allowing Writ of Error. Percy S. Dudley, Attorney for Plaintiff in Error, 26 Liberty Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals Second Circuit Filed Aug. 3, 1907 William Parkin Clerk.

49 United States Circuit Court of Appeals, Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff in Error (Defendant Below),
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant in Error (Plaintiff Below).

And afterwards, to wit, at the same term at which the above entitled cause was tried and judgment therein rendered, comes the plaintiff in error aforesaid and says that in the record and proceedings in the above entitled cause, there is manifest error in the following ruling of the Court, to wit:

In affirming a ruling of the United States Circuit Court for the

Southern District of New York, directing a verdict in favor of the defendant in error, plaintiff below.

Wherefore, plaintiff in error prays that the judgment entered herein be reversed and a new trial of the above entitled cause granted.

Dated July 29, 1907.

PERCY S. DUDLEY,
Attorney for Plaintiff in Error.

50 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Plaintiff in Error, (Defendant below), against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant in Error, (Plaintiff below). Copy. Assignment of Errors. Percy S. Dudley, Attorney for Plaintiff in Error 26 Liberty Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals Second Circuit Filed Aug 3, 1907 William Parkin Clerk.

51 United States Circuit Court of Appeals, Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff in Error (Defendant Below),
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant in Error (Plaintiff Below).

Know All Men by These Presents that we, The Hanover National Bank of the City of New York as principal, and Henry R. Carse as surety, are held and firmly bound unto William F. Suddath, as Receiver of The American National Bank of Abilene, the defendant in error above named, in the sum of seventy-five hundred dollars ($7500), to be paid to the said receiver or his successor, which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Signed with our seals and dated the twenty-ninth day of July, 1907.

Whereas, the above-named plaintiff in error, The Hanover National Bank of the City of New York, has sued out a Writ of Error to the Supreme Court of the United States to reverse the judgment in the above entitled cause by the United States Circuit Court of Appeals for the Second Circuit;

Now, Therefore, the condition of this obligation is such that
52 if the above-named, The Hanover National Bank of the City of New York, shall prosecute said Writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

[SEAL.] THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
By ALEX. D. CAMBELL,
Assistant Cashier.

HENRY R. CARSE. [SEAL.]

CITY AND COUNTY OF NEW YORK, *Southern District of New York*, ss

On this twenty-ninth day of July, in the year One thousand nine hundred and seven, before me personally came Alexander D. Cambell, to me known, who being by me duly sworn, did depose and say; that he resided in the City of New York; that he is an Assistant Cashier of The Hanover National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] JACOB NIEMANN,
Notary Public N. Y. Co.

CITY AND COUNTY OF NEW YORK, *Southern District of New York*, ss

53 On this twenty-ninth day of July, Nineteen hundred and seven, before me personally came Henry R. Carse, to me personally known and known to me to be the same person described in and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

[SEAL.] JACOB NIEMANN,
Notary Public N. Y. Co.

Form and sufficiency of the foregoing bond and approval thereof consented to.

EDWARD B. WHITNEY,
Attorney for Defendant in Error.

54 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Plaintiff in Error, (Defendant below), against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant in Error, (Plaintiff below). Copy. Bond. Percy S. Dudley, Attorney for Plaintiff in Error 25 Liberty Street, Borough of Manhattan, New York City. Approved A. C. Coxe, U. S. Cir. Judge. United States Circuit Court of Appeals Second Circuit Filed Aug. 3, 1907 William Parkin Clerk.

55 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 54 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Hanover National Bank of the City of New York against William F. Suddath as Receiver, etc. (Law Case) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District

of New York, in the Second Circuit, this 3d day of August in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the said United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WILLIAM PARKIN, *Clerk.*

56 By the Honorable E. Henry Lacombe, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit.

To William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, on the 30th day of October, 1907, pursuant to a Writ of Error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein The Hanover National Bank of the City of New York is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above named, this 31st day of July, in the year of Our Lord One thousand nine hundred and seven, and of the Independence of these United States, the one hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

ALFRED C. COXE,
Judge of the United States Circuit Court of Appeals, for the Second Circuit.

57 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Plaintiff in Error, (Defendant below), against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant in Error (Plaintiff below). Orig. Citation. Percy S. Dudley, Attorney for Plaintiff in Error, 26 Liberty Street, Borough of Manhattan, New York City. Due & timely service of a copy of the within citation is hereby admitted. Dated August 3, 1907. Edward B. Whitney. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 3, 1907. William Parkin, Clerk.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the United States Circuit Court of Appeals for the Second Circuit, before you, or some of you, be-

tween The Hanover National Bank of the City of New York, plaintiff in error, and William F. Suddath, as Receiver of The American National Bank of Abilene, defendant in error, a manifest error hath happened, to the great damage of said The Hanover National Bank of the City of New York, plaintiff in error, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States at the City of Washington, in the District of Columbia, together with this Writ, so that you have the same at the said place, before the Justices aforesaid, on the 30th day of October, 1907, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

59 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 31st day of July, in the year of Our Lord, One thousand nine hundred and seven, and of the Independence of the United States, the one hundred and thirty-second.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals in the Second Circuit.

The foregoing Writ is hereby allowed.

[Seal United States Circuit Court of Appeals, Second Circuit.]

ALFRED C. COXE,
U. S. Cir. Judge.

60 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Plaintiff in Error, (Defendant below), against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant in Error, (Plaintiff below). Writ of Error. Percy S. Dudley, Attorney for Plaintiff in Error, 26 Liberty Street, Borough of Manhattan, New York City. Due & timely service of a copy of the within writ of error is hereby admitted. Dated August 3rd, 1907. Edward B. Whitney. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 3, 1907. William Parkin, Clerk.

Endorsed on cover: File No. 20,830. U. S. circuit court of appeals, 2d circuit. Term No. 163. The Hanover National Bank of the City of New York, plaintiff in error, *vs.* William F. Suddath, as Receiver of the American National Bank of Abilene. Filed August 16th, 1907. File No. 20,830.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 13

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, APPELLANT,

vs.

WILLIAM F. SUDDATH, AS RECEIVER OF THE AMERICAN NATIONAL BANK OF ABILENE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED AUGUST 16, 1907.

(20,831.)

(20,831.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 164.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, APPELLANT,

vs.

WILLIAM F. SUDDATH, AS RECEIVER OF THE AMERICAN NATIONAL BANK OF ABILENE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of New York		
Bill of complaint	1	1
Demurrer	1	1
Final decree	13	8
Petition for appeal	15	9
Assignment of errors	17	10
Bond	19	11
Citation	21	12
Clerk's certificate	24	13
Opinion *per curiam*	26	14
Decree	27	14
Petition for appeal	30	16
Allowance of appeal	32	16
Assignment of errors	33	17
Bond on appeal	35	17
Clerk's certificate	38	18
Citation	42	19
Acceptance of service of citation	43	20
	44	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 29, 1908.

a United States Circuit Court of Appeals for the Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Complainant-Appellant,
vs.
WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene, Defendant-Appellee.

Transcript of Record.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Jan. 5, 1907. William Parkin, Clerk.

1 Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK
against
WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Southern District of New York, sitting in equity:

Your orator, The Hanover National Bank of the City of New York, in the State of New York, brings this its bill of complaint against William F. Suddath, as Receiver of the American National Bank of Abilene, in the State of Texas. And thereupon your orator complains and says:

I. That your orator is and for many years prior to 1905 was a corporation duly organized and existing under and by virtue of the laws of the United States authorizing the formation of national banking associations, having its principal office or place of business in the Borough of Manhattan, in the City of New York and State of New York.

II. That for some years prior to January 18th, 1905, The American National Bank of Abilene was a corporation duly or-
2 ganized and existing under and by virtue of the laws of the United States, authorizing the formation of national banking associations, having its principal office or place of business at the City of Abilene, in the State of Texas.

III. That on January 18th, 1905, said American National Bank was insolvent and has ever since continued insolvent and unable to

pay its debts, and on said January 18th, 1905, the Comptroller of the Currency of the United States, having become satisfied that the American National Bank was insolvent, did, under the authority of the Revised Statutes of the United States in such case made and provided, appoint Richard L. Van Zandt Receiver of The American National Bank of Abilene, and said Richard L. Van Zandt thereafter duly qualified according to law and entered upon the performance of his duties, and thereafter continued to perform his duties as receiver until on or about the thirtieth day of April, 1906, when said Richard L. Van Zandt resigned as such receiver; and that thereupon the Comptroller of the Currency of the United States did duly appoint William F. Suddath, as receiver of The American National Bank of Abilene and said William F. Suddath thereafter duly qualified according to law and entered upon the performance of his duties, and has ever since and now is performing his duties as receiver aforesaid.

IV. Your orator further shows that for upwards of a year prior to January, 1905, said American National Bank was a banking correspondent of said Hanover National Bank and kept with said Hanover National Bank a deposit account, depositing therein sundry sums of money which were placed to its credit without distinction, and withdrawing the same by checks, bills of exchange or other obligations in writing, payable at the place of business of the
3 Hanover National Bank, to the order of various persons and corporations, in the ordinary course of business, which were duly paid by the Hanover National Bank upon presentation, and from time to time accounts current were rendered and balances were adjusted between said banks; and that from time to time the American National Bank forwarded to the Hanover National Bank notes or commercial paper made by various persons and owned by the American National Bank, indorsing said paper and offering it to the Hanover National Bank for discount, with the request that in case the Hanover National Bank should discount said notes or commercial paper, the proceeds thereof should be deposited to the credit of the American National Bank in its said deposit account with the Hanover National Bank.

V. Your orator further shows that on or about November 27, 1903, the American National Bank entered into an agreement in writing with the Hanover National Bank, wherein and whereby, among other things, it agreed that all bills of exchange, notes, checks and the proceeds thereof, and all other securities, money and property of every kind owned by the American National Bank, or in which it had any interest, deposited with the Hanover National Bank, or thereafter to be deposited with the Hanover National Bank, or which might be in any wise in the Hanover National Bank, or under its control, as collateral security for loans and advances already made or thereafter to be made, to or for account of the American National Bank, by the Hanover National Bank, or otherwise, might be held, collected and retained by the Hanover National Bank, until all liabilities present or future, of the American National Bank, due or not due, of every kind, then or thereafter

contracted, should be paid and fully satisfied, as by said
4 agreement more fully appears, to which your orator begs leave to refer.

VI. Your orator further shows that on or about January 14th, 1905, the Hanover National Bank received from the American National Bank a note made by R. H. Logan and W. R. Logan for $3,000 payable to the order of the American National Bank and endorsed by it, and a letter accompanying the same offering said note for discount to the Hanover National Bank, with the request that if said note were discounted by the Hanover National Bank, its proceeds should be deposited to the credit of the American National Bank in its deposit account with the Hanover National Bank; that on or about January 14, 1905, the Hanover National Bank also received from the American National Bank a note of the Hayden Grocery Company for $2,000 payable to the order of the American National Bank and endorsed by it, and a letter accompanying the same offering said note for discount to the Hanover National Bank, with the request that if said note were discounted by the Hanover National Bank, its proceeds should be deposited to the credit of the American National Bank in its deposit account with the Hanover National Bank; that thereupon on January 14th, 1905, the Hanover National Bank notified the American National Bank by telegraph that it declined to discount said notes, and the Hanover National Bank thereupon held said notes awaiting a further communication from the American National Bank; that on or about January 16th, 1905, the Hanover National Bank also received from the American National Bank a note of C. B. & W. F. Scarborough for $1,500, and a note of L. W. Hollis for $3,500, both payable to the order of the American National Bank and endorsed by it, and a letter accompanying the same offering said notes for discount
5 to the Hanover National Bank with the request that if said notes were discounted by the Hanover National Bank, their proceeds should be deposited to the credit of the American National Bank in its deposit account with the Hanover National Bank; that thereupon on January 16th, 1905, the Hanover National Bank notified the American National Bank by telegraph that it declined to discount said notes, and the Hanover National Bank thereupon held said notes awaiting a further communication from the American National Bank; that in reply to said telegram, the American National Bank, on January 16th, 1905, wrote to the Hanover National Bank that as it declined to discount the notes forwarded as aforesaid, "should you prefer, we will send our bills payable, with collaterals attached;" that the regular time for the mails to pass between Abilene, Texas, and New York is approximately four days and said letter was received on or about January 20, 1905; that on January 17th, 1905, the Hanover Bank had in its hands, besides the notes above referred to (none of which were then due), the following notes discounted by the Hanover National Bank for the American National Bank upon its endorsement of said notes, viz: D. G. Hill, for $1,100, due January 18, 1905; George L. Paxton for $2,000, due February 14, 1906; J. H. Parramore for $2,000,

due March 9, 1905; C. W. Merchant & Sons for $7,000, due April 2, 1905, and Continental Oil & Cotton Company for $5,000, due May 9th, 1905.

VII. Your orator further shows that at the opening of business on the morning of January 17th, 1905, the balance to the credit of the American National Bank in its said deposit account with the Hanover National Bank was $16.15; that during the business hours of said January 17th, 1905, checks or other obligations of the American National Bank to the amount of $4,192.01, drawn on the Hanover National Bank and in favor of sundry persons and corporations, including a check dated January 11, 1905, for $3,825.45, in favor of the New York Life Insurance Company, were presented to the Hanover National Bank for payment and were paid at the request of the American National Bank, but no additional deposits were made by or additional remittances received from the American National Bank during said day, except a remittance of $12 which was credited to said account, so that at the close of business on January 17th, 1905, the account of the American National Bank with the Hanover Bank was overdrawn to the amount of $3,563.86; that is to say, the Hanover National Bank on said day advanced to and paid out for the account of the American National Bank, at its request, $3,563.86 in excess of any amount then standing to the credit of the American National Bank in its deposit account with the Hanover National Bank.

VIII. Your orator further shows that the Hanover National Bank advanced and paid out said amount of $3,563.86 to or for the account of the American National Bank without knowledge of the insolvency of the American National Bank and in reliance upon the possession of said four notes of R. H. Logan and W. R. Logan, Hayden Grocery Company, C. B. & W. F. Scarborough and L. W. Hollis above referred to.

IX. Your orator further shows that the Hanover National Bank entered said advance of $3,563.86 upon its books and made a temporary loan to the American National Bank of $3,500, payable on demand, and carried the balance of $63.86 as an overdraft upon the said deposit account of the American National Bank; that on July 18th, 1905, the Hanover National Bank received from the American National Bank a remittance of $27.50, and on January 20th, 1905, a remittance of $205.41, which the Hanover National Bank applied in reduction of said overdraft, leaving a balance in said deposit account to the credit of the American National Bank of $169.05; that thereafter, the Hanover National Bank incurred expenses on account of the American National Bank, for express charges, exchange and insurance in collecting the rediscounted notes held by it, amounting to $13.25, which left a net balance in said deposit account to the credit of the American National Bank of $155.80, which the Hanover National Bank applied in reduction of the indebtedness of the American National Bank to it.

X. Your orator further shows that at maturity all said notes of D. G. Hill, George L. Paxton, J. H. Parramore, C. W. Merchant &

Sons and Continental Oil & Cotton Company above referred to, were paid, and the liability of the American National Bank as endorser thereon was thereby extinguished; but that no part of said advance or loan of $3,500 on January 17th, 1905, was paid by the American National Bank, or by the receiver of said bank, nor has any tender of said amount been made to the Hanover National Bank by the American National Bank or by its receiver, though at all times the Hanover National Bank was willing to surrender said notes upon payment of the indebtedness of the American National Bank to it.

XI. Your orator further shows that thereafter the Hanover National Bank collected the said note of the Hayden Grocery Company for $2,000, less a certain offset allowed by agreement with the receiver of the American National Bank, then acting, for moneys of said Hayden Grocery Company on deposit with the American National Bank at the time of its failure, and also collected the said note of C. B. & W. F. Scarborough for $1,500, and the said note of L. W. Hollis for $3,500 and paid over to the receiver of the Ameri-
8 can National Bank, then acting, between April 7, 1905, and November 14, 1905, the proceeds of said notes, except a sum which (including principal and interest) amounted on November 20th, 1906, to $3,725.86, being the exact amount then claimed to be due from the American National Bank to the Hanover National Bank; and which the Hanover National Bank then and since has held and retained as an offset against the claim of the American National Bank and its receiver; and also delivered to the receiver for the American National Bank, then acting, between April 7, 1905, and November 14, 1905, the said note of R. H. Logan and W. R. Logan for $3,000.

XII. Your orator further shows that on or about the 7th day of April, 1905, Richard L. Van Zandt, then acting as receiver of the American National Bank, by his attorney, Edward B. Whitney, Esq., began an action at law against the Hanover National Bank, in the United States Circuit Court, for the Southern District of New York, and by his complaint in said action set forth the incorporation of the Hanover National Bank and of the American National Bank, the insolvency of the American National Bank and the appointment of said Richard L. Van Zandt as receiver on January 18th, 1905, and also set forth four several causes of action respectively for the possession of said four notes of R. H. Logan and W. R. Logan, Hayden Grocery Company, C. B. & W. F. Scarborough and L. W. Hollis hereinabove more particularly described, or in case possession thereof could not be given, for the sum of $10,000, being the aggregate face value thereof; that thereafter, the Hanover National Bank, the defendant in said action, served its answer, setting forth the circumstances under which said notes were received and the payment of the overdraft in reliance thereon, substantially as hereinabove
9 set forth and claiming a lien thereon by virtue of the collateral agreement dated November 27th, 1903, hereinabove referred to, and by virtue of its banker's lien, and claiming the right to set off the indebtedness of the American National Bank to it against said notes or their proceeds; that thereafter, and on No-

vember 14th, 1905, the cause was tried in the Circuit Court of the United States for the Southern District of New York, and after hearing the evidence of the respective parties, the jury by direction of the court found a verdict in favor of the defendant therein, and thereupon judgment was filed in favor of the defendant therein upon the merits; that thereafter, a writ of error was duly allowed to review the said judgment and was heard by the United States Circuit Court of Appeals for the Second Circuit; that thereafter the said Honorable Court handed down a decision, holding that the assignment of error based upon the ruling directing a verdict for the defendant in said action was well taken and that the judgment should be reversed; and further holding in substance that the defendant therein was not entitled to set off or counterclaim the indebtedness owing to it by the American National Bank when the latter became insolvent, that such a defense was not available in an action at law for conversion, and that if the defendant therein had any right of equitable set off, it should have been asserted by a bill in equity; that thereafter, a mandate issued out of the said United States Circuit Court of Appeals for the Second Circuit, directing judgment in accordance with its said decision, and judgment was accordingly entered in the United States Circuit Court for the Southern District of New York on the fifth day of November, 1906, reversing the judgment theretofore entered in said action and directing that a new trial be had and further proceedings taken according to law; that a new trial was had on November 20, 1906, and a verdict in favor of the said receiver as plaintiff therein for $3,725.86 was directed by the court and said receiver is threatening to enter judgment upon said verdict.

XIII. Your orator is advised that by reason of the insolvency of the American National Bank, the Hanover National Bank became entitled in equity to offset the indebtedness due to it from the American National Bank on January 18, 1905, against the demand of the American National Bank or its receiver for said four notes or their proceeds, *pro tanto;* and your orator is advised that said Circuit Court, sitting as a court of law has not jurisdiction to entertain and adjudge upon the setoff pleaded as aforesaid and that relief should be sought in a court of equity; but your orator is informed and believes that said William F. Suddath, as receiver of the American National Bank, disregarding the rights of your orator, intends to prosecute said action at law and obtain judgment against said Hanover National Bank for the balance of proceeds of said notes and enforce the collection thereof, whereby the Hanover National Bank will be deprived of its right to offset the indebtedness due from the American National Bank to it against the amount claimed by said receiver.

All of which being contrary to equity and good conscience and tending to manifest wrong, injury and oppression of your orator; and forasmuch as your orator has no adequate remedy in the premises at and by the strict rules of common law and is only relievable in a court of equity where matters of this nature are properly cognizable and re*l*evable, to the end therefore that your orator may have that relief which it can only obtain in a court of equity, and that the said

defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, it now prays the court that an accounting may be had in respect to all the
11 matters and things herein mentioned and the amount due your orator be ascertained, and a decree be entered adjudging the amount so found to be due to be allowed and set off against any amount found to be due from your orator to said defendant, arising out of said notes, or the proceeds thereof, and that said William F. Suddath, as receiver of The American National Bank of Abilene, be restrained and enjoined from further prosecution of any action at law to recover said notes or any balance of the proceeds thereof from The Hanover National Bank of the City of New York, and that it may please your Honors to grant to your orator a writ of injunction *pendente lite* directed to said William F. Suddath as such receiver and to his attorneys and agents, restraining the prosecution of such action at law until such time as your Honors shall appoint and order herein, or the final determination of this suit, and that thereupon the said injunction may be made perpetual and that your orator may have such further other or different order of relief in the premises as may be just.

May it please your Honors to grant unto your orator the Writ of Subpœna issued out of and under the seal of your Honorable Court to be directed to the said William F. Suddath, as Receiver of the American National Bank of Abilene, by a certain day and under a certain penalty therein to be inserted, to be and appear before this Court and then and there to answer all and singular the premises, and further to stand and abide such order and decree herein as shall be agreeable to equity and good conscience.

And your orator will ever pray.

November 23, 1906.

PERCY S. DUDLEY,
Solicitor and of Counsel for The Hanover National Bank of the City of New York, Complainant.

12 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Elmer E. Whittaker, being duly sworn, says: I am Cashier of The Hanover National Bank of the City of New York, the orator in the foregoing bill of complaint. The foregoing bill of complaint is true of my own knowledge except as to matters therein stated to be alleged upon information and belief and as to those I believe it to be true. The reason this verification is not made by the complainant is that said complainant is a corporation.

ELMER E. WHITTAKER.

Sworn to before me this 23rd day of November, 1906.

JACOB NIEMAN,
Notary Public, N. Y. Co.

(Endorsed:) Circuit Court United States, Southern District of New York.—The Hanover National Bank of the City of New York, against William F. Suddath, as Receiver of The American National

Bank of Abilene.—Bill of Complaint.—Percy S. Dudley, Solicitor for Complainant, 26 Liberty St., New York.—U. S. Circuit Court, Southern District of New York.—Filed Nov. 23, 1906.—John A. Shields, Clerk.

13 *Demurrer.*

United States Circuit Court, Southern District of New York. In Equity.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant.

The demurrer of the above named defendant, William F. Suddath, as Receiver of the American National Bank of Abilene, to the bill of complaint of the above named complainant.

This defendant doth demur to the said bill, and for cause of demurrer showeth,

That it appeareth by the plaintiff's own showing by said bill that he is not entitled to the relief prayed by the bill against this defendant, said bill being insufficient and devoid of equity.

Wherefore the said defendant prays judgment of this Honorable Court, whether he shall be compelled to make any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

EDWARD B. WHITNEY,
Solicitor and of Counsel for Defendant.

14 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law, and is not interposed for delay.

New York, November 26, 1906.

EDWARD B. WHITNEY,
Counsel for Defendant.

(Endorsed:) United States Circuit Court, Southern District of New York.—Hanover National Bank of the City of New York, Plaintiff, against William F. Suddath, as Receiver of the American National Bank of Abilene, Defendant.—Demurrer to Bill of Complaint.—Edward B. Whitney, Solicitor and of Counsel for Defendant, 26 Liberty St., New York.—U. S. Circuit Court, Southern District, New York—Filed Nov. 26, 1906.—John A. Shields, Clerk.

15 *Final Decree.*

Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant.

The complainant in the above-entitled cause having filed his bill of complaint annexed hereto on November 23, 1906, and the writ of subpœna having been thereupon issued, and the defendant having appeared and demurred to the bill of complaint for lack of equity, and an application having been made before me for a preliminary injunction restraining the defendant during the pendency of this suit, and upon the hearing of said motion the parties having stipulated and agreed in open court that the cause should be taken as submitted upon final hearing upon the said bill of complaint and demurrer, and that the court should enter a final decree herein according to equity, the complainant waiving the affidavit of defendant to the demurrer, and both parties waiving notice of hearing, and the court having heard the parties by their respective counsel and due deliberation, having been had;

It is hereby decreed, that the bill of complaint be and the same hereby is dismissed without costs.

Nov. 27, 1906.

E. HENRY LACOMBE.
U. S. Circuit Judge.

16 (Endorsed:) Circuit Court of the United States, Southern District of New York.—The Hanover National Bank of the City of New York, Plaintiff, against William F. Suddath, as Receiver of the American National Bank of Abilene, Defendant.—Final Decree.—U. S. Circuit Court, Southern District New York.—Filed Nov. 27, 1906.—John A. Shields, Clerk.

17 *Petition for Appeal.*

Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant.

Petition for Appeal.

The above-named complainant, The Hanover National Bank of the City of New York, conceiving itself aggrieved by the final decree entered in the above entitled cause on November 27th, 1906, hereby appeals from so much of said final decree as adjudges and decrees that the complainant's bill of complaint be dismissed and that the complainant is not entitled to set off the amount due to it from the American National Bank of Abilene, at the time of the appointment of the above-named William F. Suddath as Receiver of said American National Bank of Abilene, against the claim made against the complainant by said William F. Suddath as such receiver, and that the complainant is not entitled to an injunction against said William F. Suddath, as such receiver, to restrain him from the prosecution of any action at law for the enforcement of his claim against the complainant. And The Hanover National Bank of the City of New York prays that this, its appeal to the United States Circuit Court of Appeals for the Second Circuit, may be allowed and that a transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be
18 sent to said United States Circuit Court of Appeals for the Second Circuit.

And now, at the time of filing this petition for appeal, The Hanover National Bank of the City of New York, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray, &c.

Dated December 1st, 1906.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, *Appellant*,
By PERCY S. DUDLEY, *Solicitor*.

The foregoing appeal is allowed.
Dated, December 4th, 1906.

E. H. LACOMBE,
Circuit Judge.

(Endorsed:) Circuit Court of the United States, Southern District of New York.—The Hanover National Bank, of the City of New York, against William F. Suddath, as Receiver of the Ameri-

can National Bank of Abilene.—Petition and *Other* Allowing Appeal.—Percy S. Dudley, Solicitor for Appellant, 26 Liberty St., New York City.—Copy received.—Dated December 5, 1906.—Edward B. Whitney, Attorney for Appellee-Deft.—U. S. Circuit Court, Southern District, New York.—Filed, Dec. 6, 1906.—John A. Shields, Clerk.

19 *Assignment of Errors.*

Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene.

And now comes the said complainant and says that in the record and proceedings and decree in this cause there is manifest error in this, to wit:

First. That the Court erred in sustaining the demurrer of the defendant on the ground that it appeared by the complainant's bill that said bill was insufficient and devoid of equity and that the complainant was not entitled to the relief prayed by said bill against the defendant.

Second. That the Court erred in refusing to allow the complainant to set off the amount due to it from the American National Bank of Abilene at the time of the appointment of the above-named William F. Suddath, as receiver of the said American National Bank of Abilene against the claim made against the complainant by said William F. Suddath as such receiver.

Third. That the Court erred in refusing to enjoin the above-named defendant from the prosecution of any action at law for the enforcement of his claim against the complainant.

Fourth. That the Court erred in dismissing the complainant's bill of complaint.

20 Wherefore complainant prays that the said decree be reversed.

PERCY S. DUDLEY,
Solicitor for Complainant.

(Endorsed:) United States Circuit Court, Southern District of New York—The Hanover National Bank of the City of New York, against William F. Suddath, as Receiver of the American National Bank of Abilene.—Assignment of Errors.—Percy S. Dudley, Solicitor for Complainant, 26 Liberty St., New York City.—U. S. Circuit Court, Southern District New York.—Filed Dec. 4, 1906.—John A. Shields, Clerk.

21 *Bond.*

Circuit Court of the United States, Southern District of New York.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene.

Know all men by these presents, that We, The Hanover National Bank of the City of New York, as principal, and Henry R. Carse, as surety, are held and firmly bound unto William F. Suddath, as Receiver of the American National Bank of Abilene, the respondent above-named, in the sum of Five hundred dollars to be paid to the said receiver, or his successors, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the first day of December, 1906.

Whereas, the above-named complainant, The Hanover National Bank of the City of New York, has taken an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the decree in the above entitled cause by the Circuit Court of the United States for the Southern District of New York,

Now, therefore, the condition of this obligation is such that
22 if the above-named complainant shall prosecute said appeal to effect and answer all costs and damages that may be adjudged or awarded against it, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE HANOVER NATIONAL BANK OF
THE CITY OF NEW YORK,
By ELMER E. WHITTAKER, *Cashier.*
HENRY R. CARSE. [SEAL.]

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this first day of December, in the year One thousand nine hundred and six, before me personally came Elmer E. Whittaker, to me known, who being by me duly sworn, did depose and say; that he resided in the City of New York; that he is the cashier of the Hanover National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

JACOB NIEMAN,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this first day of December, Nineteen hundred and six, before me personally came Henry R. Carse, to me personally known
23 and known to me to be the same person described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same.

JACOB NIEMAN,
Notary Public, N. Y. Co.

Form and sufficiency of the foregoing bond and approval thereof consented to.

EDWARD B. WHITNEY,
Solicitor for Respondent.

(Endorsed:) Circuit Court United States, Southern District of New York.—The Hanover National Bank of the City of New York, against William F. Suddath, as Receiver of the American National Bank of Abilene.—Bond.—Percy S. Dudley, Attorney for Hanover National Bank, 26 Liberty St., New York City.—Approved as to form and also as to sufficiency of sureties with reservation however to the Deft-Appellee, of the right at any time to examine the sureties under oath touching their assets, liabilities and financial condition generally.—E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District New York—Filed Dec. 4, 1906.—John A. Shields, Clerk.

24 *Citation.*

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit,

To William F. Suddath, as Receiver of the American National Bank of Abilene, Appellee, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the second day of January, 1907, pursuant to a petition for appeal filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the Hanover National Bank of the City of New York is appellant and you are appellee, to show cause, if any there be, why the decree in said petition of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 4th day of December, in the year of our Lord One Thousand Nine Hundred and Six, and of the Independence of these United States the One Hundred and Thirty-first.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals, for
25 the Second Circuit.—The Hanover National Bank, etc., Appellant, *vs.* William F. Suddath, as Receiver, &c., Appellee.—Citation.—Copy received, December 5th, 1906. Edward B. Whitney, Atty. for Appellee. U. S. Circuit Court, Southern District New York.—Filed Dec. 6, 1906.—John A. Shields, Clerk.

26 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to twenty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Appellee,

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Second Circuit, this 5th day of January, in the year of our Lord One Thousand Nine Hundred and Seven, and of the Independence of the said United States the One Hundred and Thirty-first.

JOHN A. SHIELDS, *Clerk.*

27 United States Circuit Court of Appeals for the Second Circuit.

No. 265, October Term, 1906.

Argued April 12, 1907; Decided April 30, 1907.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Complainant-Appellant,
vs.
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Townsend and Coxe.

On appeal from a decree of the Circuit Court of the Southern District of New York sustaining a general demurrer and dismissing the bill without costs.

Per Curiam:

This is an equity action brought by the Hanover National Bank against William F. Suddath, as receiver of the American National Bank of Abilene, Texas. The relief prayed for is

First. That an accounting be ordered to ascertain the amount due to the complainant and that the amount so found may
28 be set off against any amount found to be due from the complainant to the defendant.

Second. That the defendant be enjoined from the further prosecution of any action at law based upon the notes referred to in the *bill.*

The facts sufficiently appear in the opinion of this court in *Van Zandt v. The Hanover Nat. Bank* (149 *Fed. Rep.* 127).

It is manifest that if the Hanover Bank was unauthorized to use the notes sent to it by the Abilene Bank, except for the specific purpose mentioned in the letter of instructions transmitting them, this action cannot succeed. The mere fact that property of the Abilene Bank was temporarily in the hands of the Hanover Bank did not give the latter a right to apply that property in payment of the former's overdraft. The Hanover Bank was under no legal obligation to pay the checks of the Abilene Bank when that bank had no balance on deposit with which to meet the checks. The Hanover Bank in paying these checks and thus creating an overdraft undoubtedly acted from the most praiseworthy motives, but the failure of the Abilene Bank on the succeeding day subjected its property, wherever situated, to the payment of the claims of its creditors.

In the *Van Zandt* case this court said:

"The notes in controversy were never deposited by the Abilene Bank with defendant, nor did they come into its hands a collateral security within the commonly accepted meaning of these terms. They were temporarily in the hands of the defendant under an option to purchase them. We conclude that they did not come within the terms of the pledge, and that the defendant did not obtain a lien upon them.

If the check drawn by the Abilene Bank upon the defendant which caused the overdraft of its account, had been drawn with knowledge of the defendant's refusal to discount the notes, a different question would be presented, but it is fair to assume that
29 this check was drawn in the expectation that before its presentation the notes would have been discounted and the proceeds credited to the Abilene Bank."

The decree is affirmed.

Percy S. Dudley, for the Complainant-Appellant.
Edward B. Whitney, for the Defendant-Appellee.

30 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 10th day of May one thousand nine hundred and seven.

Present: Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

HANOVER NATIONAL BANK, Complainant-Appellant,
vs.
WILLIAM F. SUDDATH, as Receiver, etc., Defendant-Appellee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. K. T.
A. C. C.

31 Endorsed: United States Circuit Court of Appeals, Second Circuit. Hanover Bank *vs.* Suddath. Order for Mandate. United States Circuit Court of Appeals Second Circuit Filed May 10 1907. William Parkin Clerk.

32 United States Circuit Court of Appeals, Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Complainant-Appellant,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant-Appellee.

The above-named complainant-appellant, The Hanover National Bank of the City of New York, conceiving itself aggrieved by the judgment entered in the above entitled cause on May tenth, 1906, affirming the final decree entered in the above entitled cause in the Circuit Court of the United States for the Southern District of New York on November 27th, 1906, hereby appeals from so much of said judgment of affirmance as adjudges and decrees that the complainant's bill of complaint be dismissed and that the complainant is not entitled to set off the amount due to it from The American National Bank of Abilene at the time of the appointment of the above-named William F. Suddath as Receiver of said American National Bank of Abilene, against the claim made against the complainant by said William F. Suddath, as such receiver, and that the complainant is not entitled to an injunction against said William F. Suddath, as such receiver, to restrain him from the prosecution of any action at law for the enforcement of his claim against the complainant. And The Hanover National Bank of the City of New York prays that this, its appeal to the Supreme Court of the United

States, may be allowed and that a transcript of the record
33 and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the said Supreme Court of the United States.

And now, at the time of filing this petition for appeal, The Hanover National Bank of the City of New York, appellant, files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States.

And your petitioner will ever pray, &c.

Dated July 29, 1907.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
By PERCY S. DUDLEY, *Solicitor.*

The foregoing appeal is allowed.

Dated July 31 1907.

ALFRED C. COXE,
U. S. Cir. Judge.

34 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Complainant-Appellant, against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant-Appellee. Petition and Order Allowing Appeal. Percy S. Dudley, Solicitor for Appellant, 26 Liberty Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals Second Circuit Filed Aug 3, 1907 William Parkin Clerk.

35 United States Circuit Court of Appeals, Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Complainant-Appellant,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant-Appellee.

And now comes the said complainant-appellant and says that in the record and proceedings and judgment in this cause there is manifest error in this, to wit:

First. That the Court erred in affirming the decree of the Circuit Court of the United States for the Southern District of New York, sustaining the demurrer of the defendant-appellee on the ground that it appeared by the complainant's bill that said bill was insufficient and devoid of equity and that the complainant was not entitled to the relief prayed by said bill against the defendant-appellee.

Second. That the Court erred in affirming the decree of the Circuit Court of the United States for the Southern District of New York, refusing to allow the complainant-appellant to set off the amount due to it from The American National Bank of Abilene at the time of the appointment of the above-named William F.

Suddath as Receiver of the said The American National Bank of Abilene against the claim made against the complainant-appellant by said William F. Suddath as such receiver.

36 Third. That the Court erred in affirming the decree of the Circuit Court of the United States for the Southern District of New York, refusing to enjoin the above-named defendant-appellee from the prosecution of any action at law for the enforcement of his claim against the complainant-appellant.

Fourth. That the Court erred in affirming the decree of the Circuit Court of the United States for the Southern District of New York, dismissing the complainant's bill of complaint.

Wherefore, complainant prays that the said judgment be reversed.

PERCY S. DUDLEY,
Solicitor for Complainant-Appellant.

37 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Complainant-Appellant, against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant-Appellee. Assignment of Errors Percy S. Dudley, Solicitor for Appellant, 26 Liberty Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals Second Circuit Filed Aug 3, 1907 William Parkin Clerk.

38 United States Circuit Court of Appeals, Second Circuit.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Complainant-Appellant,
against
WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene, Defendant-Appellee.

Know all men by these presents, that We, the Hanover National Bank of the City of New York, as principal, and Henry R. Carse, as surety, are held and firmly bound unto William F. Suddath, as Receiver of The American National Bank of Abilene, the defendant-appellee above named, in the sum of Five hundred dollars to be paid to the said receiver or his successors, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the twenty-ninth day of July, 1907.

Whereas, the above-named complainant-appellant, The Hanover National Bank of the City of New York, has taken an appeal to the Supreme Court of the United States, to reverse the judgment in the above entitled cause by the United States Circuit Court of Appeals for the Second Circuit.

Now, therefore, the condition of this obligation is such that if the above-named complainant-appellant shall prosecute said

39 appeal to effect and answer all costs and damages that may be adjudged or awarded against it, if it shall fail to make

good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
[SEAL.] By ALEX. D. CAMPBELL, *Assistant Cashier.*
HENRY R. CARSE. [SEAL.]

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this twenty-ninth day of July, in the year One thousand nine hundred and seven, before me personally came Alexander D. Campbell, to me known who being by me duly sworn, did depose and say; that he resided in the City of New York; that he is an Assistant Cashier of the Hanover National Bank of the City of New York, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] JACOB NIEMANN,
Notary Public, N. Y. Co.

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

On this twenty-ninth day of July, Nineteen hundred and
40 seven, before me personally came Henry R. Carse, to me personally known and known to me to be the same person described in and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

[SEAL.] JACOB NIEMANN,
Notary Public, N. Y. Co.

Form and sufficiency of the foregoing bond and approval thereof consented to. EDWARD B. WHITNEY,
Solicitor for Appellee.

41 Endorsed: United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Complainant-Appellant, against William F. Suddath, as Receiver of The American National Bank of Abilene, Defendant-Appellee. Copy Bond Percy S. Dudley, Solicitor for Appellant, 26 Liberty Street, Borough of Manhattan, New York City. Approved A C Coxe U S Cir Judge, United States Circuit Court of Appeals Second Circuit Filed Aug 3, 1907 William Parkin Clerk.

42 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 41 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in

the case of Hanover National Bank of the City of New York against William F. Suddath as Receiver, etc, (Equity case) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3d day of August in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the said United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

43 By the Honorable E. Henry Lacombe, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit.

To William F. Suddath, Receiver of The American National Bank of Abilene, defendant-appellee, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the City of Washington, in the District of Columbia, on the 30th day of October, 1907, pursuant to a petition for appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein The Hanover National Bank of the City of New York is appellant, and you are Appellee, to show cause, if any there be, why the judgment in said petition of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above named, this 31st day of July, in the year of Our Lord, One thousand nine hundred and seven, and of the Independence of these United States the One Hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

ALFRED C. COXE,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

44 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. The Hanover National Bank of the City of New York, Complainant-Appellant, against William F. Suddath, as Receiver of the American National Bank of Abilene, Defendant-Appellee. Orig. Citation Percy S. Dudley, Solicitor for Appellant, 26 Liberty Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Aug 3 1907. William Parkin Clerk. Due and timely service of a copy of the within citation is hereby admitted Dated August 3rd 1907 Edward B. Whitney.

Endorsed on cover: File No. 20,831. U. S. circuit court of appeals, 2d circuit. Term No. 164. The Hanover National Bank of the City of New York, appellant, *vs.* William F. Suddath as Receiver of the American National Bank of Abilene. Filed August 16th, 1907. File No. 20,831.

Office Supreme Court, U. S.
FILED.
APR 8 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. ~~163~~ 12

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Plaintiff-in-Error,

vs.

WILLIAM F. SUDDATH, AS RECEIVER OF THE AMERICAN NATIONAL BANK OF ABILENE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

PERCY S. DUDLEY,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 163.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff in Error,

vs.

WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Brief for the Plaintiff in Error.

The action was originally brought by Richard L. Van Zandt, as Receiver of The American National Bank of Abilene, Texas, acting under the direction of the Comptroller of the Currency, for the recovery from the possession of the Hanover National Bank of four promissory notes alleged to be the property of the plaintiff. Prior to the failure of the Abilene Bank these notes had been forwarded to the

Hanover Bank for discount, which was refused (fols. 7-14).

The answer of the Hanover Bank set forth that $3,500 had been loaned to the Abilene Bank upon the security of the four notes, and that it was entitled to retain possession thereof until said loan was repaid, by reason of its general banker's lien and by reason of a special lien created by a collateral written agreement between the two banks (fols. 15-26).

The action was tried at Circuit before Judge Lacombe on November 14, 1905, and a verdict was directed in favor of the defendant. Upon a writ of error, the Circuit Court of Appeals reversed the judgment below, Judge Wallace writing an opinion which is reported 149 Fed. Rep. 127. Van Zandt having resigned as Receiver, William F. Suddath was appointed as his successor and substituted in the action.

The case was retried before Judge Hough on November 20, 1906, and a verdict directed in favor of the plaintiff for $3,725.86. The Circuit Court of Appeals, upon substantially the same record as upon the first trial, affirmed the judgment upon the grounds stated in the previous decision (fols. 42 and 43). The Hanover Bank was then allowed a writ of error for the review by this Court of the judgments below (fols. 46-60).

Specification of Error.

The affirmance of the ruling of the Circuit Court directing a verdict in favor of the defendant-in-error, the plaintiff below (fol. 49).

Statement of Facts.

The Hanover Bank, for more than a year prior to January, 1905, had been the New York correspondent of the Abilene Bank. The latter bank

kept with the Hanover Bank an ordinary general deposit account, making deposits and withdrawing them by checks or other obligations, and, from time to time, forwarded to the Hanover Bank notes or commercial paper made by various persons and owned by said bank, endorsing such notes and offering them to the Hanover Bank for sale, with a request that, in case the Hanover Bank should buy said notes, the proceeds thereof should be deposited to the credit of the Abilene Bank in its deposit account (fols. 18 and 31).

On November 27, 1903, the Abilene Bank signed an agreement, a copy of which is annexed to the answer (fols. 25 and 26), by which a special lien was created in favor of the Hanover Bank for advances. This agreement was in force at the time of the transaction in question, and is more fully referred to below.

On January 9th and 10th, 1905, the Abilene Bank wrote to the Hanover Bank, enclosing in the letters respectively notes of third persons for $2,000 and $3,000, and requesting the Hanover Bank to discount the same and place the proceeds to the credit of the Abilene Bank. These letters were received by the Hanover Bank on January 14th, and on that date it replied by the following telegrams: "Referring letters ninth and tenth not agreeable," and "Referring previous dispatch transfer or ship currency" (fols 31 and 32).

On January 12th, 1905, the Abilene Bank enclosed in a similar letter "for discount and credit" two notes for $3,500 and $1,500 respectively. This was received by the Hanover Bank on January 16th, and on the same day the Hanover Bank telegraphed: "Letter Jany. twelfth recd not satisfactory," and also wrote: "Your letter of the 12th instant, with enclosures, is at hand, and we have just wired you 'Letter 12th received. Not satisfactory.' We are not discounting the enclosures for you, but

hold same as collateral to your indebtedness to us, and remain" (fols. 32 and 33). This letter did not reach Abilene until January 20th.

On January 16th, the Abilene Bank wrote: "We have just received your wire. The rediscounts we sent you were mostly renewals and in every instance, 'good as gold.' Since the drop in cotton, collections are at a standstill, and our clients expect us to stay with them, and we are obliged to ask the same indulgence from our correspondents. Should you prefer, we will send our B/P with collaterals attached. We trust you will accord us the leniency asked for." This letter did not reach New York until January 20th (fol. 34).

On January 16th and 17th the Hanover Bank held unmatured notes, rediscounted for the Abilene Bank and endorsed by it, to the amount of $17,100 (fols. 20 and 33).

On January 17th, in the morning, the balance in the deposit account to the credit of the Abilene Bank was only $616.15. During the day, checks to the amount of $4,192.01, including one for $3,825.45, dated January 11, 1905, and drawn by the Abilene Bank, were presented to the Hanover Bank for payment. Having received no answer to its letters and telegrams, the Hanover Bank telegraphed: "Sent you two telegrams January fourteenth. Telegraph us what you have done" (fol. 33).

Still receiving no response, the vice-president of the Hanover Bank, on being informed that the checks presented, if paid, would overdraw the account, got out the collateral agreement above referred to, looked at it, and, believing that the Hanover Bank had the right to hold the four notes in question, authorized the overdraft which made the checks good (fol. 34). He then credited the deposit account with a loan of $3,500, which practically balanced it, and wrote the Abilene Bank: "As your

account showed overdrawn to-day over $3,000, we have made you a temporary loan of $3,500 against collateral in our hands." This letter did not reach Abilene until January 21st (fols. 33 and 34).

On January 18, 1905, the Abilene Bank closed its doors and went into the hands of the Receiver appointed by the Comptroller (fols. 34, 8 and 9). There is no proof of any insolvency prior to that time, or notice thereof to the Hanover Bank.

Since that time the rediscounts held by the Hanover Bank have been paid and it has collected from the four notes in question the loan of $3,500, turning over the balance of proceeds and other notes to the plaintiff and leaving in dispute the agreed sum of $3,725.86, for which amount the verdict was directed in favor of the plaintiff (fols. 31, 33 and 35).

Argument.

The plaintiff in error claims that it had the right to retain the four notes or the balance of their proceeds (1) by the express terms of the collateral agreement; (2) by virtue of its general bankers' lien; and (3) by authority or consent of the Abilene Bank.

1. The plaintiff in error had the right to retain the notes under the express terms of the collateral agreement.

It appears that the Hanover Bank was the New York correspondent of the Abilene Bank and on November 27, 1903, more than a year before the transaction in question, the two banks entered into an agreement upon which future transactions were to be based. It is a matter of common knowledge that banks all over the country keep balances with their correspondents in New York to meet their exchange drafts on New York, and that at times

such banks borrow money from their correspondents to maintain their balances and for other purposes. The relations between such correspondent banks are naturally closer than those between banks having only infrequent or isolated transactions (*Auten* vs. *U. S. Nat. Bank, 174 U. S., 125, 145*). It may be stated to be the common practice, if not also a matter of common knowledge, for such banks to enter into agreements similar to that in evidence here, the New York bank having its own general printed form which is signed by the out-of-town bank.

The obvious purpose of the parties was to enlarge the rights of the Hanover Bank beyond the legal implications which would arise from any single transaction and, in the expected series of transactions, to make all the property of the Abilene Bank in its hands security for any and every particular liability; the corresponding advantage to the Abilene Bank being a greater facility in obtaining credit due to the broader security held by the Hanover Bank. This purpose is manifest from the terms of the instrument and is confirmed by the fact that the instrument is a general form prepared for common use with customers of the Hanover Bank and not merely for special use with the Abilene Bank.

Such contracts are sanctioned by the authorities even where they relieve the pledgee from the common law duties which would ordinarily rest upon him, unless in contravention of a statute, against public policy or fraudulent. (*Hiscock* vs. *Varick Bank, 206 U. S., 28*, and cases cited.)

This collateral agreement, so far as material, runs that the Abilene Bank agrees "that all bills of "exchange, notes, checks, and the proceeds thereof, "and all other securities, money and property of "every kind owned by the undersigned, or either

"or any of them, or in which they or any or either "of them, have any interest deposited with said "bank, or which may hereafter be deposited with "said bank, or which may be in anywise in "said bank, or under its control, as collateral se- "curity for loans or advances already made or here- "after to be made to or for account of the under- "signed, by said bank, or otherwise, may be held, "collected and retained by said bank, until all "liabilities present or future of the undersigned, "or any or either of them, due or not due, of every "kind to said bank, now or hereafter contracted, "shall be paid and fully satisfied," &c.

If it be conceded that said notes were not placed in the possession of the Hanover Bank specifically as collateral security, nevertheless they were lawfully in the possession of the Hanover Bank as property of the Abilene Bank, and, under the agreement, as soon as the advance on the overdraft was made, the lien attached to the notes until the advance was repaid.

This seems to be the simple meaning of the words used and the plain intent of the instrument. In fact, the defendant in error admitted in the court below that the agreement could be so construed, but contended that it should not be applied to paper "non-contractually" obtained. It is not necessary to decide here that the agreement would apply to property accidentally or tortiously obtained, as suggested by the defendant in error, but merely that it applies to property rightfully in possession of the Hanover Bank. Giving a distinctive meaning to the several phrases used in the collateral agreement, this case falls within the phrase covering property "which may be in any wise in said bank," as distinguished from security specifically deposited. The Abilene Bank voluntarily sent the notes to the Hanover Bank for re-

discount, which was refused. If returned by mail, at least four days would have been lost, during which the Abilene Bank could not have used this property to secure necessary funds. The Hanover Bank therefore held the notes and telegraphed the Abilene Bank. This certainly was not wrongful and the possession of the notes must be deemed lawful and proper. This status was not changed except as the result of the acts of the Abilene Bank. With unauthorized confidence that the Hanover Bank would rediscount the notes and credit the proceeds, the Abilene Bank, on January 11, 1905, had sent out at least one check drawn on the Hanover Bank in excess of its actual deposit balance. On January 14, however, the Abilene Bank was informed of the refusal of the discount and was asked to "transfer [a credit from some other bank] or ship currency [direct]" (fol. 32.). Yet it neither complied with this request nor revoked its orders for payment addressed to the Hanover Bank and contained in its outstanding checks. Hence, when these checks were presented and the deposit account was overdrawn, which the Hanover Bank permitted in reliance on the notes, an implied contract arose and the lien attached.

But the defendant in error has claimed that the above construction is incorrect; that the words "as collateral security" limit and modify all the preceding phrases; and that, according to the punctuation, the words "or otherwise" express an alternative to advances *by the Hanover Bank* and not an alternative to a specific deposit as collateral security. The punctuation of the agreement is open to criticism, but not in this respect. Without a comma between "by said bank" and "or otherwise," there might be some ground for that construction, but the comma cuts the connection and refers this latter phrase to some previous phrase.

Besides, the meaning of the words does not admit of this construction. "Otherwise" means "in some other manner." The only other words indicating manner are "*as* collateral security," and hence "or" must be construed as co-ordinating "otherwise" with these words; whereas a proper correlative to "by said bank" would be "or [by] some other bank, corporation or individual." Furthermore, such a construction would have no practical meaning, as there can be no occasion for the Abilene Bank to deposit in the Hanover Bank security for loans or advances made by any other bank.

The learned Judge who wrote the opinion on the first appeal likewise conceded that the agreement was susceptible of the construction claimed by the plaintiff in error, and, so construed, would entitle the Hanover Bank to retain the notes; but he held that "the words 'or otherwise' may be read as "referring to the nature of the liability for which "the collateral is security, and as meaning to "pledge the collateral not only for loans and ad- "vances but also for any liabilities otherwise aris- "ing, such for instance as that of an endorser or "surety upon the commercial paper of third per- "sons. If the agreement had been intended to "pledge all securities belonging to the Abilene "Bank that might come in any manner to the "hands of the defendant, or even of all that might "rightfully come to its hands, that intention could "have been manifested unmistakably and in very "simple terms, by omitting the words 'deposited' "and 'collateral security,' &c. The latter are "descriptive words which identify the securities "which the defendant may hold and collect by "reference to the purposes for which they come into "his hands. If the contention for the defendant "in error is correct, these words were used un-

"necessarily." *(Van Zandt* vs. *Hanover Nat. Bank, 149 Fed. Rep., p. 129.)*

The construction placed on the instrument by Judge Wallace makes the words "as collateral security" a limitation of the securities and property previously referred to and makes the words "or otherwise" express an alternative to "loans or advances," so as to cover "liabilities otherwise arising, such, for instance, as that of an indorser or surety upon the commercial paper of third persons."

As noted above, the only grammatical correlative of the phrase "or otherwise" is the phrase "as collateral security," etc., those being the only words descriptive of manner.

If the agreement was intended to read "loans or advances * * * or otherwise," and, by so doing, to add other liabilities to "loans or advances," apt words were not used to express such an intent; indeed, with due respect to the learned judge, the words themselves, so read, are unintelligible without the addition of the words: "or *for liabilities* otherwise *arising*," which he himself found necessary to express his meaning. Certainly they do not "*pledge* the collateral not only for loans or advances but also for any liabilities otherwise arising," because there are no words of pledge in this connection, the whole clause being descriptive; and, further, because the succeeding clauses of the agreement provide that all the property so described "may be held * * * until all liabilities present and future * * * shall be paid," etc.

Nor were the words between "as collateral security" and "or otherwise" used unnecessarily, and it is the insertion of these words that led the learned Judge below to interpret the agreement as he did. But without them, there would have been

room for the claim that the collateral security referred to was only such as was then in possession of the bank for existing loans *(Farr* vs. *Nichols, 132 N. Y., 327,* and cases cited), and so it was specified to cover not only the security for loans already made but also the security for those thereafter to be made; "to or for account of the undersigned" referring naturally to loans to or advances for account of the undersigned.

In another place in his opinion Judge Wallace says: "The parties here were contracting with ref-"erence to notes, property, etc., which should be "deposited by the Abilene Bank with the defend-"ant, or should come under its control as collateral "security for certain obligations and liabilities, and "the general words 'or otherwise' should be held to "relate to notes and property which should come "to the hands of the defendant by way of deposit "or collateral security, or some other kind of bail-"ment" (p. 130).

Here the learned Judge seems to adopt a different construction and correlates "or otherwise" with "as collateral security," to that extent agreeing with the plaintiff in error; but he restricts the meaning to cases of bailment because he assumes that to have been the intent of the contracting parties. It may be enough to reply that in this case the Hanover Bank was the bailee of the notes at the time it allowed the overdraft *(Hunt* vs. *Wyman, 100 Mass., 198,* cited in *Benjamin on Sales, Sec. 2, Am. note)* and was therefore entitled to a lien upon them. But a correct construction of the instrument compels a broader interpretation. If the subject matter of the agreement was only property pledged or deposited in some other manner as security, no enlarging sense can be given to the words: "or which may be in anywise in said bank or under its control," as the verb "deposited" is

technically as broad as the words "as collateral security" (or any other words of bailment) which are supposed to qualify all that precedes. If the phrase "as collateral security" be referred to property "deposited" only, then the phrase "or otherwise" may be referred to property "which may be in anywise in said bank or under its control," and thus the whole clause will express a comprehensiveness which the instrument was obviously intended to effect.

In ordinary cases, one of the first acts of a bank whose correspondent suspends is to seize any balance of the deposit account. This, of course, could not be pledged as specific collateral. Under New York law, the bank could retain this as a set-off against matured paper, but not against unmatured paper *(Frank* vs. *Mercantile Nat. Bank, 182 N. Y., 264)*, although the rule in the United States courts is more liberal *(Schuler* vs. *Israel, 120 U. S., 506; Scott* vs. *Armstrong, 146 U. S., 499)*. Even this ordinary security must have been neglected under the agreement as construed by the court below, because the bank balance, not being already "collateral security" or other bailment, would not come within its terms. In fact, as so construed, the lien under the instrument is not extended beyond the scope of the ordinary banker's lien, and in this respect, no effect is given to the evident purpose of the parties.

The plaintiff in error submits that only by the construction for which it contends can accurate meaning be given to each and every word and phrase used and the evident intention of the parties effectuated, whereas the construction adopted by the court below renders certain words and phrases superfluous or gives them a meaning which the context does not bear out.

The learned Judge cites the case of *Gillet* vs. *Bank*

of America, 160 N. Y., 549, as an authority for applying the rule that this agreement must be construed most strictly against the Hanover Bank. The same case, in explaining that rule, says: "In "the construction of written contracts, it is the "duty of the court, as near as may be, to place itself "in the situation of the parties and from a con- "sideration of the surrounding circumstances, the "occasion and apparent object of the parties, to "determine the meaning and intent of the language "employed. Indeed, the great object, and prac- "tically the only foundation of rules for the con- "struction of contracts is to arrive at the inten- "tion of the parties. This is a most conspicuous "and far-reaching rule, and involves the nature of "the instrument, the condition of the parties "and the objects which they had in view, and "when the intent is thus ascertained, it is to be "effectuated unless forbidden by law. 'Contracts "are not to be interpreted by giving a strict and "rigid meaning to general words or expressions "without regard to the surrounding circumstances "or the apparent purpose which the parties sought "to accomplish'" (pp. 555-556).

And in *Sattler* vs. *Haydock, 160 N. Y., 291, 297,* the same court held: "It is always the duty of a "court, in construing a written instrument, if pos- "sible, to ascertain the intention of the parties; and "in order to determine its proper construction re- "sort must be had to the instrument as a whole, "and *effect must be given to every clause and part "thereof when it can be done without violence.*"

The rule in the United States courts is the same.

"Wherever words [of a contract] admit of a "more extensive or more restricted signification, "they must be taken in that sense which is re- "quired by the subject matter, and which will best "effectuate what it is reasonable to suppose was

"the real intention of the parties" per Marshall, Ch. J., in *Church* vs. *Hubbart, 2 Cranch 233.*

"All agree that as a general rule in the inter-"pretation of written instruments, the intention of "the parties must control, and that such intention "is to be gathered from the words used—the words "being interpreted, not literally nor loosely, but "according to their ordinary signification. If "the words be clear and explicit, leaving no room "to doubt what the parties intended, they must "be interpreted according to their natural and or-"dinary significance. If the words are ambiguous, "then resort may be had to such evidence, written "or oral, as will disclose the circumstances attend-"ing the execution of the instrument and place the "court in the situation in which the parties stood "when they signed the writing to be interpreted" per Harlan, J., in *U. S.* vs. *Choctaw Nation, 179 U. S. 494, 531.*

In the Gillet case *(160 N. Y., 549)*, the Court held that the provisions of a collateral note were intended to and did cover all transactions between the bank and its customer, but did not extend to the purchase of a dishonored note from a third person and the application of the bank's collateral to its payment. The intimated doubt of the good faith of the transaction there in question sufficiently distinguishes it from the present transaction, and the very principles by which the Court there reached its conclusion that that transaction was not covered by the collateral note, require the conclusion here that this transaction was covered by the collateral agreement.

In *Hutchinson* vs. *Manhattan Co., 150 N. Y. 250*, where a similar collateral note was involved, which authorized the application of "all moneys now or hereafter in their hands on deposit or otherwise to the credit of or belonging to the undersigned,

whether the said obligations or liabilities are then due or not due," the Court said: "It thus appears "that the relation existing between the bank and "Patton & Co. was something more than the or-"dinary one of bank and depositor. The defendant "bank held the written consent and authority of "Patton & Co. to apply on all their existing or "future obligations moneys belonging to them "which the bank held 'on deposit or otherwise'" (p. 254). The Court held that this covered the proceeds of a draft which the bank had received from Patton & Co., and had forwarded for collection, without accepting it as a deposit, although Patton & Co. were not the true owners of the draft. The Court held that the bank was also entitled to hold the proceeds as against Patton & Co., because "it parted with present value, relying on the draft "and its proceeds as part of its collateral security" (p. 255).

In *21 Am. & Eng. Enc. of Law (2d Ed.), p. 1016*, "otherwise is defined as meaning in a different "manner; in another way; differently; in other "respects. Like 'other,' 'otherwise' when followed "by an enumeration generally receives an *ejusdem* "*generis* interpretation. But, as in case of 'other,' "this rule has many exceptions, and where the in-"tent requires it a comprehensive interpretation "will be given to 'otherwise,' and the rule of *ejus-"dem generis* will be held to be inapplicable," citing many cases.

2. The defendant had the right to retain the notes by virtue of its banker's lien.

> "A bank advancing money to a party "dealing with it has a lien on all of the se-"curities of the latter which are in its hands "for the amount of his general balance, un-"less such securities are impressed with a "particular trust or some particular agree-"ment affects them. This lien rests upon the

"presumption of credit extended in faith of "securities in possession, or in expectancy, "but does not arise in reference to securi- "ties of a bank under circumstances, or "where there is a particular mode of deal- "ing, inconsistent with such lien. Nor where "they have been pledged for a particular "loan or debt. Nor will the bank be entitled "to a lien upon the funds of the depositor "merely to provide against a possible loss "on his unmatured paper which it has dis- "counted" (citing cases).

1 Daniels Neg. Inst. (5th Ed.), p. 342, §334b.

"The rule may be broadly stated, that the "bank has a general lien on all moneys and "funds of a depositor in its possession for "the balance of the general account. Of "course, so long as the balance is in favor "of the depositor, the lien has no vitality "in it. But when payment upon an over- "draft, a discount, an acceptance, or other "species of advance or loan by the bank to "him creates an indebtedness on his part, "all the funds which the bank has or obtains "to his credit may be applied upon such in- "debtedness until it is fully discharged and "without any request or direction from "him."

1 Morse on Banks and Banking (4th Ed.), § 324.

"It is familiar law that a bank receiving "notes for collection is entitled, in the ab- "sence of a contract expressed or implied "to the contrary, to retain them as security "for the debt of the party depositing the "notes (1 Jones' Liens (2d Ed.), §244; "*Bank of Metropolis* v. *New England Bank*, "1 How., 234, 239; *Reynes* v. *Dumont*, 130 "U. S., 354, 391, 392)," per Brewer, *J.*, in *Joyce* vs. *Auten, 179 U. S., 591*, at p. 597.

These authorities make it clear that the lien attaches to property which is not impressed with a trust inconsistent therewith. If the form of a remittance indicate that it is not the general property of the remitting bank, or if the remittance be made and received upon an agreement to apply it to a specific purpose, the lien will not attach; but such agreement or application to a specific purpose must affirmatively appear, for the presumption otherwise is that the lien attaches. In this case, the point is made that the letters enclosing the notes placed the notes in possession of the Hanover Bank only for discount, and that the Hanover Bank, upon refusing to discount the notes, was obliged to return them. But upon the refusal of the Hanover Bank to make the discount, its possession did not become unlawful; the notes still remained the property of the Abilene Bank, and there was no implied obligation to return them after the Abilene Bank became further indebted to the Hanover Bank.

There was no trust created nor special agreement in regard to these notes, any more than when notes are delivered for collection, as in *Joyce* vs. *Auten* (*supra*). That case cites the very cases relied on by the plaintiff as the authority for the "familiar law" stated above.

The question of the retention of the notes as collateral security for the previous rediscounts is not involved here, because a new advance of $3,500 was made in reliance upon the security of these notes, and that is the only indebtedness for which a lien is now claimed. The overdrafts by the Abilene Bank were equivalent to a request to make the advances upon the security of any property then in the hands of the Hanover Bank, and under the circumstances the four notes come within this description.

In Judge Wallace's opinion, he says: "If the

"check drawn by the Abilene Bank upon the de-"fendant, which caused the overdraft of its ac-"count, had been drawn with knowledge of the "defendant's refusal to discount the notes, a differ-"ent question would be presented; but it is fair to "assume that this check was drawn in the expecta-"tion that before its presentation the notes would "have been discounted and the proceeds credited to "the Abilene Bank" (p. 130). And also, "The Abi-"lene Bank had not asked for a temporary loan, "and was entitled to have its notes used as it had "directed, so as to realize their full proceeds; and "if not so used, it was entitled to make such dis-"position of the notes as it saw fit" (*Van Zandt* vs. *Hanover Nat. Bank, 149 Fed. Rep., 129*).

It may be conceded that the Abilene Bank drew the checks which caused the overdraft in the expectation that the notes would be discounted, but it had no right to *rely* upon such a credit, and the presentation of its checks or orders to pay, addressed to the Hanover Bank, in the absence of sufficient funds of its own to meet them, was a request by the Abilene Bank for advances to the amount thereof (whether in the form of overdraft or temporary loan is not material), for it certainly cannot be assumed that the Abilene Bank meant that payment of the checks should be refused if the notes were not discounted. Furthermore, the Abilene Bank knew on January 14th that the expected discount would not be made, and that the balance to its credit would be insufficient to meet the checks drawn by it and then outstanding; but it neither remitted additional funds or credits nor revoked these orders for payment. It is fair to assume that the Abilene Bank expected the Hanover Bank to pay the checks and recoup itself out of the notes, which were the only possible means of reimbursement then in its hands, and it must be treated as if

it had drawn the checks, knowing that they would, if paid, create an overdraft.

In *Reynes* vs. *Dumont*, *130 U. S.*, *35½*, at pages 390-394, the Chief Justice reviewed the cases at length, and decided that there a special agreement in writing between the parties was inconsistent with a general lien. The letters from the Abilene Bank are not inconsistent with a lien, for it was the hope of the bank that the Hanover Bank would lend it money by discounting the notes.

In *Biebinger* vs. *Continental Bank*, *99 U. S.*, *143*, a customer, after paying his debt, left his collateral at the bank. Subsequently, he again became indebted, and "it was held that *as it did not appear "that money was loaned or debt created on the "faith of possession of the deed*, the bank could "not claim against the debtor's assignee an equi-"table mortgage by the deposit of the con-"veyance" (as stated by Fuller, *Ch. J.*, in *Reynes* vs. *Dumont*, *130 U. S.*, at p. 393). In this case it is in evidence that the advance or loan in question was made wholly in reliance upon the notes (fol. 34).

In *Bank of Montreal* vs. *White*, *154 U. S.*, *660*, there is no statement of facts reported, but it is apparent that, at the time the note was received for discount and credit, there was an existing overdraft. While the Court held that, as the discount was refused, the bank could not retain the note as general collateral, yet it does not appear that the bank afterwards lent any money in reliance on the note, or else a very different question would have been presented. As reported, that case is similar to *Petrie* vs. *Myers*, *54 How. Pr.*, *513*, also cited by the plaintiff.

In *Armstrong* vs. *Chemical Nat. Bank*, *41 Fed. Rep.*, *234*, the Fidelity National Bank of Cincinnati, which was largely indebted to the Chemical Bank, negotiated a further loan on specific securi-

ties. The Chemical Bank advanced some money after receiving the securities, but asked that the equity be pledged to cover all indebtedness. Before a definite agreement was reached, an attachment was served and the Fidelity Bank failed. After defining the nature of a banker's lien and citing *Reynes* vs. *Dumont* (*supra*), it was held by Wallace, *J.*, at Circuit, that the Chemical Bank *could retain the amount of its subsequent advances*, but no more.

A case, very like this in its facts, is *Continental Nat. Bank* vs. *Weems, 69 Texas, 489* (cited in *1 Daniel's Neg. Inst., 5th Ed., p. 342, § 334b*). There the Texas Bank sent notes to the Continental Bank for rediscount and credit. The latter declined to discount the paper and so notified its correspondent. Before the letter reached Texas, drafts drawn in expectation of the discount reached New York. The Continental Bank paid these drafts, relying upon the notes for reimbursement. Upon the failure of the Texas Bank, the Continental Bank claimed to hold the notes, not only for the overdrafts, but also for the general balance of account. It was held that the Continental Bank had "no lien *except for the amount of the drafts paid after the paper was received*" (p. 501).

The Receiver of the Abilene Bank has no greater right to recover these notes than the Bank itself would have had if it had sued, and he took the assets subject to the obligations existing at the time of his appointment (*Scott* vs. *Armstrong, 146 U. S. 499; Rankin* vs. *City Nat. Bank, 208 U. S. 541*). It is inconceivable that the Abilene Bank would have been allowed to recover these notes without repaying the Hanover Bank the advances made at its request, and in reliance upon the security of the notes; and its letter of January 16th (fol. 34), written after it knew that the Hanover Bank had refused to rediscount the notes, does not

indicate a desire for the return of the notes, but contains a request for a loan with the notes as collateral, which it in fact received. It is submitted that the authorities uphold the application of the banker's lien to the present case.

3. The defendant had the right to retain the notes by authority or consent of the Abilene Bank.

The Abilene Bank undoubtedly expected the Hanover Bank to discount the notes and place the proceeds to its credit, and drew against its deposit account with this expectation, resulting in the overdraft of $3,500. The Hanover Bank could have declined not only to discount the notes, but also to pay the checks causing the overdraft. It did not know of the impending failure of the Abilene Bank, and after trying to communicate by telegraph without result, acted in the interests of the Abilene Bank to avoid injuring its credit or embarrassing it by reason of the refusal of the discount. It therefore advanced the necessary money to pay the checks in reliance upon the four notes as security, and then wrote the Abilene Bank that it had done so. Although not in possession of instructions to that effect, substantially such authority had already been mailed in Texas by the Abilene Bank on January 16, 1905: "Should you prefer, we will send our B/P with collaterals attached. We trust you will accord us the leniency asked for" (fol. 34). The authority or request was thereafter in existence (notwithstanding any construction put upon the letters of remittance) to loan the Abilene Bank $3,500 and hold the four notes as collateral security. This authority may be invoked to justify the action of the Hanover Bank.

Mailing the letters was a delivery to the Hanover Bank and to the Abilene Bank respectively. If the Abilene Bank had mailed cash or other

credits on January 14th, it cannot be doubted that the Hanover Bank could have lawfully appropriated them for its repayment, although not received until after the failure (*McDonald, Receiver,* vs. *Chemical Nat. Bank, 174 U. S. 610, 620; Ruggles* vs. *Am. Cent. Ins. Co., 114 N. Y. 415*). It seems clear that if the contents of the letter above quoted had been telegraphed to the Hanover Bank, there could be no question of its authority to hold the notes as collateral for its advances, and it is submitted that the action of the Hanover Bank in anticipation of authority, was confirmed by the letter then in the mails and subsequently received (*McDonald, Receiver,* vs. *Chemical Nat. Bank, supra*).

For these reasons the judgment below should be reversed and a new trial ordered.

PERCY S. DUDLEY,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
APR 8 1909
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 13

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,
Appellant,

vs.

WILLIAM F. SUDDATH, AS RECEIVER OF THE AMERICAN NATIONAL BANK OF ABILENE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANT.

PERCY S. DUDLEY,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 164.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Appellant,

vs.

WILLIAM F. SUDDATH, as Receiver of The American National Bank of Abilene.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Brief for the Appellant.

This suit was brought by The Hanover National Bank of the City of New York to restrain William F. Suddath, as Receiver of The American National Bank of Abilene, Texas, from the prosecution of an action at law to recover from the possession of the complainant four promissory notes, or the balance of proceeds thereof, alleged to be the property of the Abilene Bank, to ascertain the amount due from said Abilene Bank or its Receiver to the Han-

over Bank, and to set off said amount against the claim of the Receiver, on the ground that the complainant had no adequate remedy at law, but in equity was entitled to such set-off (fols. 10 and 11). The defendant Receiver demurred to the complainant's bill, and, on an application by the complainant for a preliminary injunction, it was stipulated by the parties that the cause should be taken as submitted upon final hearing upon the bill of complaint and the demurrer; whereupon it was decreed that the bill of complaint be dismissed (fols. 13-15). The complainant appealed to the Circuit Court of Appeals, which affirmed the decree of the Circuit Court (fol. 30), and the complainant then appealed to this Court (fol. 32).

Specification of Error.

First.—That the Court erred in affirming the decree of the Circuit Court, sustaining the demurrer of the defendant-appellee on the ground that it appeared by the complainant's bill that said bill was insufficient and devoid of equity and that the complainant was not entitled to the relief prayed by said bill against the defendant-appellee.

Second.—That the Court erred in affirming the decree of the Circuit Court, refusing to allow the complainant-appellant to set off the amount due to it from The American National Bank of Abilene at the time of the appointment of the above-named William F. Suddath as Receiver of the said The American National Bank of Abilene against the claim made against the complainant-appellant by said William F. Suddath as such receiver.

Third.—That the Court erred in affirming the decree of the Circuit Court, refusing to enjoin the defendant-appellee from the prosecution of any ac-

tion at law for the enforcement of his claim against the complainant-appellant.

FOURTH.—That the Court erred in affirming the decree of the Circuit Court, dismissing the complainant's bill of complaint (fols. 35 and 36).

Statement of Facts.

The facts are stated in the bill of complaint and are identical, so far as the transaction itself is concerned, with those involved in the case of the Hanover National Bank against Suddath (No. 163), argued herewith upon a writ of error to review the affirmance of the judgment at law entered in favor of the Receiver for the recovery of the notes, or the proceeds thereof, referred to above.

The Hanover Bank, for more than a year prior to January, 1905, had been the New York correspondent of the Abilene Bank. The latter bank kept with the Hanover Bank an ordinary general deposit account, making deposits and withdrawing them by checks or other obligations, and from time to time, accounts current were rendered and balances were adjusted between the banks. From time to time, the Abilene Bank forwarded to the Hanover Bank notes or commercial paper made by various persons and owned by said bank, endorsing such notes and offering them to the Hanover Bank for discount, with a request that, in case the Hanover Bank should discount said notes, the proceeds thereof should be deposited to the credit of the Abilene Bank in its deposit account. On November 27, 1903, the Abilene Bank signed an agreement, by which a special lien was created in favor of the Hanover Bank for advances (fols. 3 and 4).

On January 14, 1905, the Hanover Bank received from the Abilene Bank notes of third persons for $2,000 and $3,000 respectively, with the request that the Hanover Bank discount the same and place the

proceeds to the credit of the Abilene Bank, which the Hanover Bank declined to do and informed the Abilene Bank by telegraph to that effect. On January 16, 1905, the Hanover Bank received from the Abilene Bank two other notes for $3,500 and $1,500 respectively, for discount and credit, and replied by telegraph that it declined to make the discount. The Hanover Bank held said four notes awaiting further instructions from the Abilene Bank (fols. 4 and 5).

On January 17, 1905, the balance of the Abilene Bank in its deposit account was $616.15, and during that day its checks drawn on the Hanover Bank to the amount of $4,192.01 were presented for payment. The Hanover Bank, without knowledge of any insolvency of the Abilene Bank and in reliance upon the possession of the four notes above referred to, allowed an overdraft and paid out for account of the Abilene Bank $3,563.86 in excess of the balance on deposit. The Hanover Bank entered this advance upon its books as a temporary loan of $3,500 (fols. 6 and 7).

On January 18, 1905, the Abilene Bank became openly insolvent and closed its doors, and a receiver was appointed by the Comptroller (fol. 2). Subsequently, the Hanover Bank collected from the four notes sufficient to pay the $3,500 loan and returned the remaining note and balance of proceeds to the Receiver. The sum retained (including principal and interest) amounted to $3,725.86 on November 20, 1906 (fols. 7 and 8).

The Receiver demanded the return of the four notes, making no tender of the amount due from the Abilene Bank, and thereafter began an action in the United States Circuit Court for the Southern District of New York to recover possession of the four notes. The Hanover Bank answered in said action, setting forth the circumstances under which said notes were received and the payment of the

overdraft in reliance thereon and claiming a lien thereon by virtue of its banker's lien, as well as by the terms of the collateral agreement above referred to, and claiming the right to set-off the indebtedness of the Abilene Bank to it against said notes or their proceeds. That cause was tried on November 14, 1905, and Judge Lacombe directed a verdict in favor of the defendant. Upon writ of error the Circuit Court of Appeals reversed the judgment entered and ordered a new trial (*Van Zandt* vs. *Hanover Nat. Bank, 149 Fed. Rep. 127*). In the opinion of Judge Wallace, it was held in substance that the defendant therein was not entitled to set-off or counterclaim the indebtedness owing to it by the Abilene Bank when the latter became insolvent; that such a defense was not available in an action at law for conversion, and that if the defendant therein had any right of equitable set-off, it should have been asserted by a bill in equity. Thereafter a new trial was had and a verdict directed in favor of the plaintiff in said action for $3,725.86, and the plaintiff threatened to enter judgment on the verdict. Thereupon, the Hanover Bank filed its bill of complaint herein to restrain the prosecution of said action at law and to obtain from a court of equity the set-off and other relief to which it was not entitled in a court of law. The Receiver demurred to the bill of complaint, and upon the hearing Judge Lacombe directed the complaint to be dismissed and a decree to that effect was entered (fols. 8-16).

Argument.

The Hanover Bank was entitled, in equity, to set-off the indebtedness due to it from the Abilene Bank against the claim of the Receiver for the notes owned by the Abilene Bank, or the proceeds thereof.

It is undisputed that the advance of $3,500 was

made to the Abilene Bank in reliance upon the possession of the notes claimed by the Receiver and in the belief that the Hanover Bank would have a lien upon the notes for the amount advanced. At the time the checks were presented the Hanover Bank was safe; no legal obligation rested upon it to pay the checks in excess of the deposit account; and no advantage could result to it if it did pay them. But the circumstances were somewhat extraordinary. The Abilene Bank probably expected the notes to be discounted and relied upon the proceeds to meet the checks then outstanding. When the Hanover Bank refused the discount, it at once notified the Abilene Bank to ship currency from Abilene, or transfer a credit balance from some other city. If this had been done promptly, the Hanover Bank would have had the funds by January 18th. Not receiving any remittance, the Hanover Bank again telegraphed to know what the Abilene Bank had done. Still it received no money and no instructions, and checks for over $4,000 were presented for payment. The Hanover Bank could, of course, have thrown the checks out, and apparently the Receiver thinks it should have done so. While the Hanover Bank had no suspicion that the Abilene Bank was actually insolvent, it naturally realized that the Abilene Bank needed money and that refusal of the checks might ruin its credit and turn a momentary embarrassment into public insolvency. It probably felt a moral obligation, because the situation was created in part by its failure to comply with the request of the Abilene Bank. The Hanover Bank therefore acted as the best interests of the Abilene Bank seemed to require, and as it felt the officers of that bank would have acted had they been present. It is inconceivable that those officers would have decided not to pledge the notes for their immediate needs, even if they could not get

the full discount. The Hanover Bank loaned the money to pay the checks and protect the credit of the Abilene Bank, trusting in the possession of the notes to secure it until the Abilene Bank could make such arrangement as it wished. If the Abilene Bank had not closed its doors almost at once, no criticism of the action of the Hanover Bank would ever have been made. No one can deny that by payment of the overdraft, a valid indebtedness from the Abilene Bank was thereby created which was due and payable immediately and prior to the insolvency. The Receiver took the estate of the insolvent bank with all its obligations; in fact, the insolvency of the Abilene Bank is an additional reason why this court of equity should intervene to do justice between the parties.

The decision in *Scott* vs. *Armstrong*, *146 U. S., 499*, the facts and procedure in which were somewhat similar to the case at bar, fully states the principles of law applicable to this case.

Fuller, *Ch. J.*, held that the Receiver took the assets of the Fidelity Bank as a mere trustee for creditors, subject to all claims and defenses which might have been interposed against the insolvent corporation before the liens of the United States and of general creditors attached.

> "The right to assert set-off at law is of "statutory creation, but courts of equity "from a very early day were accustomed to "grant relief in that regard independently, "as well as in aid of statutes upon the sub-"ject.
>
> "In equity, relief was usually accorded, "says Mr. Justice Story (Eq. Jur., Sec. "1435), 'where, although there are mutual "and independent debts, yet there is a mutual "credit between the parties, founded, at the "time, upon the existence of some debts due "by the crediting party to the other. By "mutual credit, in the sense in which the "terms are here used, we are to understand,

"a knowledge on both sides of an exist-
"ing debt due to one party and a credit by
"the other party, founded on, and trusting
"to such debt, as a means of discharging it.'

"This definition is hardly broad enough to
"cover all the cases where, as the learned
"commentator concedes, there being a 'con-
"nection between the demands, equity acts
"upon it and allows a set-off under partica-
"lar circumstances' (Sec. 1434). Courts of
"equity frequently deviate from the strict
"rule of mutuality, when the justice of the
"particular case requires it, and the ordin-
"ary rule is that where the mutual obliga-
"tions have grown out of the same transac-
"tion, insolvency on the one hand justifies
"the set-off of the debt due upon the other
"(*Blount* vs. *Windley*, 95 U. S., 173, 177)."

The learned Chief Justice then cited *Carr* vs. *Hamilton*, 129 U. S., 252, where the amount due on an endowment policy of an insolvent insurance company was set-off against the amount due on a mortgage from the holder of the policy. He also cited *Scammon* vs. *Kimball*, 92 U. S., 362, where a banker holding insurance in an insolvent company was allowed to set-off against the amount of insurance on his property, the amount of the company's deposit in his hands. He then said:

"Indeed, natural justice would seem to
"require that where the transaction is such
"as to raise the presumption of an agreement
"for a set-off, it should be held that the
"equity that this should be done is superior
"to any subsequent equity not arising out
"of a purchase for value without notice. In
"the case at bar, the credits between the
"banks were reciprocal and were parts of
"the same transaction, in which each gave
"credit to the other on the faith of the simul-
"taneous credit, and the principle applicable
"to mutual credits applied."

After deciding that the provisions of the National Bank Act forbidding preferences did not prevent the application of this principle, he said:

> "Undoubtedly, any disposition by a "National Bank, being insolvent or in con-"templation of insolvency, of its choses in "action, securities or other assets, made to "prevent their application to the payment of "its circulating notes, or to prefer one cred-"itor to another, is forbidden; but liens, "equities or rights arising by express agree-"ment, or implied from the nature of the "dealings between the parties, or by opera-"tion of law, prior to insolvency and not in "contemplation thereof, are not invalidated. "The provisions of the act are not directed "against all liens, securities, pledges or "equities, whereby one creditor may obtain "a greater payment than another, but "against those given or arising after or in "contemplation of insolvency."

The Court then held that the set-off should have been allowed by the Court sitting in equity.

This case is recognized as the leading authority upon the subject; as for example, in Bispham's Principles of Equity (7th Ed., 1905, Sec. 327), it is said:

> "Courts of Chancery frequently deviate "from the strict rule of mutuality when the "justice of the particular case (*e. g.*, insol-"vency of one of the parties) requires it,"

citing Scott *vs.* Armstrong; also *2 Bolles, Modern Law of Banking (1907) p. 742*, quoting the same passage.

In *Rolling Mill Company* vs. *Ore and Steel Company, 152 U. S., 596, 615*, it is said:

> "Cross-demands and counterclaims, "whether arising out of the same or wholly "disconnected transactions, and whether "liquidated or unliquidated, may be enforced "by way of set-off whenever the circum-"stances are such as to warrant the inter-

> "ference of equity to prevent wrong and "injustice. Again, it is well established "that equity will entertain jurisdiction and "afford relief against the collection of a "judgment where in justice and good con- "science it ought not to be enforced, as where "there is a meritorious, equitable defense "thereto which could not have been set up "at law, or which the party was, without "fault or negligence, prevented from inter- "posing (citing cases). The adjustment of "demands by counterclaim or set-off, rather "than by independent suit, is favored and "encouraged by the law, to avoid circuity of "action and injustice (citing cases). By the "decided weight of authority it is settled "that the insolvency of the party against "whom the set-off is claimed, is a sufficient "ground for equitable interference"

(citing many cases and then quoting *Schuler* vs. *Israel, 120 U. S., 506*).

In *Armstrong* vs. *Chemical National Bank, 41 Fed. Rep. 234*, the Fidelity National Bank of Cincinnati, which was largely indebted to the Chemical Bank, negotiated for a further loan on specific securities. The Chemical Bank advanced some money after receiving the securities, but asked that the equity be pledged to cover all indebtedness. Before a definite agreement was reached, an attachment was served and the Fidelity Bank failed. Judge Wallace said:

> "Under the circumstances, any overdraft "made after the securities were sent to the "defendant and after it had advanced the "$200,000, should be regarded as one allowed "on the faith of the securities, in the absence "of distinct evidence to the contrary"

(p. 238); and he allowed a set-off to that extent.

The same liberal rule is recognized in *N. Y. Co. Bank* vs. *Massey, 192 U. S. 138*.

Even under the strict rules prevailing in the State courts of New York, the set-off claimed here

would have been allowable in an action at law, and the contract indebtedness on the overdraft could have been counterclaimed under the Code against the claim in tort for the retention of the notes (*Fera* vs. *Wickham*, *135 N. Y., 223*; *DeCamp* vs. *Thompson*, *159 N. Y., 444*; *Empire Feed Company* vs. *Chatham National Bank*, *30 App. Div., 476*, and cases cited; *Thompson* vs. *Kessel*, *30 N. Y., 383*; *G. & H. Mfg. Co.* vs. *Hall*, *61 N. Y., 226, 236*; *Brown* vs. *Buckingham*, *21 How. Pr., 190*).

The case is one, which, it would seem, should peculiarly appeal to a court of equity. The action of the Hanover Bank in allowing the overdraft was not for its own benefit or advantage, but in the obvious interest of the Abilene Bank. Their relation as correspondents, the inability to communicate directly, owing to the distance, and the unusual circumstances, combined, fully justified, if they did not require, the action taken. It is a frequent occurrence for the accounts of out-of-town banks to be overdrawn, owing to the failure or delay of expected remittances, and some indulgence in this respect is usual and proper and should be encouraged. Otherwise a New York bank, acting on the strict letter of the law contended for by the appellee, would be forced to refuse checks beyond the amount on deposit and perhaps irretrievably ruin the credit of a correspondent bank, no matter what might be the cause, or however reasonable the explanation.

The appellant respectfully submits that the Hanover Bank is equitably entitled to retain the amount advanced by it and that the decree below should be reversed, and the Receiver restrained from prosecuting the action at law to enforce his claim against it for the same amount.

PERCY S. DUDLEY,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES;

OCTOBER TERM, 1908.

Office Supreme Court,
FILED
APR 14 1909
JAMES H. McKENN

No. 163. 12

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK,

Plaintiff in Error,

vs.

WILLIAM F. SUDDATH, as Receiver of the American National Bank of Abilene,

In Error to the Circuit Court of Appeals for the Second Circuit.

No. 164. 13

SAME,

Appellant,

vs.

SAME.

Appeal from the Circuit Court of Appeals for the Second Circuit.

Brief for Defendant in Error and Appellee.

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Supreme Court of the United States.

THE HANOVER NATIONAL BANK OF THE CITY OF NEW YORK, Plaintiff in Error, *vs.* WILLIAM F. SUDDATH as Receiver of the American National Bank of Abilene.	No. 163.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SAME, Appellant, *vs.* SAME.	No. 164.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Defendant in Error and Appellee.

No. 163 was originally an action of replevin under the New York practice (p. 7), brought by Rich-

ard L. Van Zandt, predecessor of defendant in error, as Receiver of the American National Bank of Abilene, Texas, against this plaintiff in error The Hanover National Bank. It was brought to recover the possession of four promissory notes. Three of the notes were collected by defendant *pendente lite* and part of the proceeds thereof remitted to plaintiff; and defendant then delivered the fourth note to plaintiff. The amount reserved by defendant in making the payment aforesaid was $3,725.86, being an amount owed to it by the bank of which plaintiff is receiver. The answer was amended at the trial by setting up these facts (pp. 16-17). The case was tried before Judge Hough and a jury on November 20, 1906. A verdict was directed for the plaintiff for $3,725.86, and defendant excepted.

Statement of Facts.

No. 163.

Defendant (this plaintiff in error), the Hanover National Bank, was the New York correspondent of the American National Bank of Abilene, Texas. The latter bank, besides making deposits and withdrawing them by checks or bills of exchange, from time to time sent commercial paper, offering it to defendant for sale. If the Hanover bank purchased, the proceeds were deposited by it to the credit of its correspondent (Answer, Par. V., p. 10, admitted p. 16).

On November 27, 1903, the Abilene bank signed one of the familiar so-called cutthroat agreements.

It is annexed to the answer (p. 14), and the important portion is set forth at the commencement of our Point II, *infra*.

On January 18, 1905, the Abilene bank closed its doors (p. 19) and its receiver was appointed (Complaint, Par. III, p. 5, not controverted). The four notes which its receiver sought in this action to replevy are claimed by plaintiff in error, both under a general banker's lien and under the agreement above quoted.

Two of these notes had been mailed to the Hanover bank by the Abilene bank's President on January 9 and 10, 1905, respectively, with letters saying "We hand you" the notes "for discount and credit." The letters had been received January 14 with the notes enclosed, and the Hanover bank upon their receipt had sent two telegrams concerning them. The first of these telegrams read "Referring letters ninth and tenth not agreeable." The second read "Referring previous despatch transfer or ship currency" (p. 17).

The other two notes had been mailed on January 12, also in a letter saying "We hand you" the notes "for discount and credit." This letter had been received January 16 with the notes enclosed, and the Hanover bank had telegraphed back "Not satisfactory" (p. 17).

On January 17, having received no answer to any of these telegrams, the Hanover bank had wired for an answer to those of the 14th (p. 18).

The above statement includes all correspondence prior to the failure, which was received by the party addressed; and there were no oral transactions.

Certain other letters, mailed before or about the time of the failure, were not received by the addressees until thereafter, owing to the fact that the mail between Abilene and New York requires approximately four days (p. 16). These letters were put in evidence by plaintiff in error, and are as follows:

A letter of January 16 from the Hanover bank, referring to the two notes mailed from Abilene on the 12th. This letter said (p. 18):

> "We are not discounting the enclosures for you but hold same as collateral to your indebtedness to us, and remain."

Another letter of January 16 from the Abilene bank, referring to the telegram refusing to discount these two notes, urging their discount, and offering as an alternative to send bills payable with collaterals attached (p. 18).

A letter of January 17 from the Hanover bank, saying (p. 18):

> "As your account showed overdrawn today over $3000, we have made you a temporary loan of $3500 against collateral in our hands."

On the morning of that date, January 17, there stood on the Hanover bank's books to the credit of the Abilene bank the sum of $616.15. There would have been a sum to its credit at the time of its failure, notwithstanding the refusal to discount these four notes, if it had not been for an item of $3825.45 which came in on that day. This was the Abilene bank's check upon the Hanover bank, dated January 11, to the order of the New York Life Insurance Company, collected on January

17 through the clearing house. The Hanover bank entered on its books a loan of $3,500 to the Abilene bank, which resulted in a debit balance on the morning of the 18th of $63.86 (p. 18).

It is not shown that there was any authority for this $3500 entry, or that the Abilene bank was informed of it, although the amount is precisely that of one of the four notes in suit (p. 17). On the other hand, the explanation given by defendant's vice-president is, that upon the overdraft of January 17, 1905, being called to his attention "he got out the agreement, a copy whereof is annexed to the answer, looked at it, and believed that he had a right to hold these four notes as collateral; that he relied upon the four notes and whatever rights he would have in regard to them by collateral agreement or otherwise, when allowing the overdraft" (pp. 18-19).

No. 164.

The facts are substantially the same, but stated in the form of a bill in equity to establish an equitable set off and enjoin the prosecution of the receiver's action No. 163.

The Opinions Below.

The case was originally tried before Lacombe, J., who directed a verdict for defendant. The judgment was reversed, Wallace, J. (Townsend and Coxe, JJ., concurring), saying (Van Zandt *v.* Hanover Bank, 149 Fed. Rep., 127):

> "The Abilene bank had not asked for a temporary loan, and was entitled to have its

notes used as it had directed, so as to realize their full proceeds; and if not so used, it was entitled to make such disposition of the notes as it saw fit. As the notes had been sent to the defendant for a specific use, they did not become subject to a general banker's lien. Such a lien does not attach upon securities which are deposited with the banker for a special purpose.

* * * * * * * *

"The language of the agreement of November 27th is susceptible of different interpretations. It may be read as follows:

"'That all * * * notes * * * owned by the undersigned * * * deposited with said bank * * * or which may be in any wise in said bank or under its control, as collateral security * * * or otherwise, * * * may be held, collected and retained by said bank.'

"Read in this way, it is capable of being construed as a pledge of all notes belonging to the Abilene bank that may in any way come into the hands of the defendant, even though they come accidently or against the will of the Abilene bank. But such a reading omits a material part of the instrument [&c. p. 15, *infra*].

* * * * * * * *

"If the agreement had been intended to pledge all securities belonging to the Abilene bank that might come in any manner to the hands of the defendant, or even of all that might rightfully come to its hands, that intention could have been manifested unmistakably, and in very simple terms, by omitting the words 'deposited' and 'as collateral security,' etc. The latter are descriptive words which identify the securities which the defendant may hold and collect by reference to the purposes for which they come into his hands. If the contention for the defendant

in error is correct, these words were used unnecessarily.

"The language of a contract is always presumed to be used with reference to the matter in the minds of the parties when they contract. Therefore words of broad signification will be interpreted with reference to the subject matter of the contract, unless the intention is clear that they should be taken in the broad meaning. Jones, Construction of Contracts, § 220. The parties here were contracting with reference to notes, property, etc., which should be deposited by the Abilene bank with the defendant, or should come under its control as collateral security for certain obligations and liabilities, and the general words 'or otherwise' should be held to relate to notes and property which should come to the hands of the defendant by way of deposit or collateral security, or some other kind of bailment.

"It is apparent, from the fact that the Abilene bank is not named in the instrument, otherwise than as 'the undersigned,' that it was one for general use prepared by the defendant. Such instruments are always to be construed most strictly against the party by whom they have been prepared. This rule was applied to an instrument like the present one in Gillet *v.* Bank of America, 160 N. Y., 549, 55 N. E. 292. It is not to be inferred, in the absence of clear terms, that the Abilene bank intended to authorize the defendant to keep and collect such of its notes or property as it did not intend to part with, or such as might be obtained by the defendant without its consent.

"The notes in controversy were never deposited by the Abilene bank with defendant, nor did they come into its hands as collateral security within the commonly accepted mean-

ing of these terms. They were temporarily in the hands of the defendant under an option to purchase them. We conclude that they did not come within the terms of the pledge, and that the defendant did not obtain a lien upon them.

"If the check drawn by the Abilene bank upon the defendant, which caused the overdraft of its account, had been drawn with knowledge of the defendant's refusal to discount the notes, a different question would be presented; but it is fair to assume that this check was drawn in the expectation that before its presentation the notes would have been discounted and the proceeds credited to the Abilene bank."

In their opinion upon the present appeal the same judges say (Hanover Bank *v.* Suddath, 153 Fed. Rep. 1022, Record No. 164, p. 15):

"It is manifest that if the Hanover Bank was unauthorized to use the notes sent to it by the Abilene bank, except for the specific purpose mentioned in the letter of instructions transmitting them, this action cannot succeed. The mere fact that property of the Abilene Bank was temporarily in the hands of the Hanover Bank did not give the latter a right to apply that property in payment of the former's overdraft. The Hanover Bank was under no legal obligation to pay the checks of the Abilene Bank, when that bank had no balance on deposit with which to meet the checks. The Hanover Bank, in paying these checks and thus creating an overdraft, undoubtedly acted from the most praiseworthy motives; but the failure of the Abilene Bank on the succeeding day subjected its property, wherever situated, to the payment of the claims of its creditors, &c."

Argument.

I.

The Hanover Bank had no general banker's lien on the four notes.

The general banker's lien arises from a usage which has been judicially noticed by the courts as part of the law merchant (Brandao *v.* Barnett, 12 Cl. & Fin. 787). The usage is "controlled by any special agreement which shows that it was not intended by the parties; as it may also be repelled by circumstances showing that the securities did not come into the hands of the banker, or were not held by him in the ordinary course of business" (Story on Agency, § 381). The more familiar exceptions are when the securities upon which the lien is claimed are "accidentally in its possession, or not in its possession in the course of business as a bank" or when they are deposited for a special purpose (1 Morse on Banks and Banking, 4th Ed. pp. 597-9). The banker's lien is not applicable as a general rule when the "securities were delivered to him under a particular agreement" (Bank of Metropolis *v.* New England Bank, 1 How., 234-239), or in any way indicating no intent to subject to a lien (Leese *v.* Martin, L. R., 17 Eq., 224, 235).

The general subject was under thorough investigation by this court in Reynes *v.* Dumont, 130 U. S. 354, a case argued by leading counsel. The Chief Justice said (pp. 390-4), that while the general lien (quoting from Kent) "is founded on custom and is not favored" and is "looked at with

jealousy'' yet that it ''does arise in favor of a bank or banker out of contract expressed, or implied from the usage of the business, in the absence of anything to show a contrary intention. It does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing inconsistent with such general lien'' (Citing Brandao *v.* Barnett). He quotes from National Bank *v.* Insurance Company, 104 U. S. 54, 71, that the lien ordinarily ''attaches in favor of the bank upon securities and moneys of the customer deposited in the usual course of business,'' etc., and adds that ''if, as argued by counsel, there is a presumption, as between customer and banker, that the securities or property of the customer, found in the possession of the banker, have been left with him to secure him generally against loss, this is not an irrebuttable presumption, and each case stands upon its own circumstances.''

The most familiar exception to the general banker's lien is the case of a deposit of money or security to secure against some particular liability. This is an exception because it appears that the parties had a special agreement about the matter, and therefore there is no ground for implying any other agreement from general usage. It is mainly this exception which the banks seek to meet by such ''cutthroat agreements'' as the one shown in the present case, and which will be discussed under the next point of our argument.

In addition to this more common exception to the general rule, there are other exceptions based

upon similar reasoning; namely, in the words which I have quoted from this Court, where the founds or securities in question were not in the bank's possession "in the course of its business as such" or where they are in its hands under circumstances inconsistent with such a general lien.

Reynes *v.* Dumont was itself such a case. The securities in question had been sent to the bankers for a specific purpose. That purpose had been accomplished, but they had been permitted to remain in the banker's hands as depositaries because they were in a good market and a place convenient for procuring loans, and because the expressage upon their return would have been very heavy. The decision (negativing the lien) was partly based upon that in Biebinger *v.* Continental Bank, 99 U. S. 143, where a deed had been on deposit with the bank as collateral security for the customer's current indebtedness and discounts. After payment of this indebtedness and a temporary suspension of dealings he incurred new indebtedness to the bank, but as it did not appear that the money was loaned or debt created on the faith of the deed, the bank's claim of a lien thereon was denied (130 U. S. at pp. 392-3).

The reasoning of all these authorities leads to the conclusion that a general lien cannot attach to securities which are handed to a banker in order that he may do a particular thing with them, when he refuses to do that thing. After such refusal they are no longer in his hands at all except physically, and it is his duty to hand them back again.

While this precise state of facts seems not to have arisen in the Federal courts before this case, there is ample authority upon it elsewhere. Thus

Mr. Justice Story enumerates among the cases where the general lien does not attach because the property is not held in the ordinary course of business the case of instruments "casually left at the banking house after he has refused to advance money on them as a security" (Story on Agency § 381). Mr. Morse also instances as an example of this exception to the rule the case of "securities left with the bank after its refusal to discount them or loan money on them" (Morse, *ubi sup.*). Mr. Jones lays down the same rule (1 Jones on Liens, 2nd Ed., § 244).

The leading case everywhere cited is Lucas *v.* Dorrien, 7 Taunt., 278, decided in 1817. The defendants were bankers. A customer brought a lease to the bank asking for an advance upon it. The bank refused, and he left the lease lying there without saying why. The Court held that the bank had no lien upon the lease. The point, although it had been properly reserved, seems to have been conceded upon the argument, the only reference to it in the opinions being by Burrough, J., who said, "There is not a question as to the lease."

This case was followed in Petrie *v.* Myers, 54 How. Pr. (N. Y.), 513, where a note had been offered to the bank for discount, which was refused, but the bank claimed to hold it for the general balance of account.

In Brandao *v.* Barnett, a customer had left with his bank some exchequer bills to be exchanged for new bills. Before the exchange was made he was taken ill, and they were left for a long time. The Exchequer Chamber held that the bills were subject to the general banker's lien, distinguishing

the Lucas case on the ground that in that case the banker was not in possession "in the way of his business" (6 Man. & G., 630, 666). The House of Lords reversed the decision and held that there was no lien (12 Cl. & Fin., 787).

In Bank of Montreal *v.* White, 154 U. S., 660, the question arose between the bank and the maker of the note which it claimed as collateral security. The transaction was quite similar to that in the present case. As apears by the record, a customer wrote the bank enclosing the paper and saying, "Please discount and place to my credit, and charge me with the overdraft you kindly allowed on Friday." The bank advanced moneys, but afterwards asked its customer to get the notes discounted elsewhere. This the customer was unable to do, and finally the bank consented to make the discount. The notes were subject to an equitable defense as between the original parties. Plaintiff (the bank) requested a charge that if it had paid out any money on the strength of the paper offered as collateral it was entitled to the extent of such payment to protection as a *bona fide* holder for value, although it "did not in fact enter said notes to the credit of said company as a discount until after such advances were made." The Court refused to charge this, and charged instead that the case turned on the question whether the bank had notice of the advance before it actually entered the discount. The bank coming up on a writ of error, Chief Justice Waite said that "It is nowhere even in the remotest degree intimated that if the discount was declined the note might be kept as collateral. The charge asked and refused was therefore wholly immaterial and the

judgment cannot be reversed because it was not given."

Such a transaction makes the bank a trustee of the paper, to apply it as directed by the sender (see Libby *v.* Hopkins, 104 U. S., at page 309).

The passage relied upon from Continental Bank *v.* Weems, 69 Texas, 489, was *obiter,* so far as the appellate court is concerned, for the receiver did not appeal.

II.

The Hanover Bank had no lien upon the four notes by the agreement of November 27, 1903.

That agreement, which is signed "The American Nat'l. Bank, by J. G. Lowdon, Pt.," is as follows:

> "For and in consideration of one dollar [&c.], the undersigned agree with said Bank that all Bills of Exchange [&c.] owned by the undersigned, or either or any of them, or in which they, or any or either of them have any interest deposited with said Bank, or which may hereafter be deposited with said Bank, or which may be in anywise in said Bank, or under its control, as collateral security *for loans or advances already made or hereafter to be made to or for account of the undersigned, by said Bank,* or otherwise, may be held, collected and retained by said Bank, until all liabilities present or future of the undersigned, or any or either of them, due or not due of every kind to said Bank, now or

> hereafter contracted, shall be paid and fully satisfied" [&c.];

with right to sell on one day's notice at public or private sale, &c.

The Circuit Court of Appeals point out (p. 6, *supra*) that the instrument is ambiguous, and that by disregarding the passage above italicized it could be construed so as to impound all paper physically in the bank's possession, however it got there. But the court proceeds to say:

> "With these [italicized] words supplied, the words 'or otherwise' may be read as referring to the nature of the liability for which the collateral is security, and as meaning to pledge the collateral, not only for loans and advances, but for any liability otherwise arising, such, for instance, as that of an indorser or surety upon the commercial paper of third persons."

The instrument thus construed extends the general banker's lien so as to take in two classes of securities: first, those pledged by the signer for a specific loan or advance to itself; and second, (by operation of the words "or otherwise") those pledged by the signer for a specific loan or advance to some other person, for whom the signer is surety. The words "or otherwise" also bring within the instrument collateral deposited by the signer with some other bank or third party upon discount by the latter of paper subsequently rediscounted upon the same security by the Hanover bank.

The Circuit Court of Appeals has pointed out that the language of the instrument shows it to be on a form prepared by the Hanover bank. This appears not only from the word "under-

signed", but also from the words "or either or any of them"; and is indeed conceded (Brief for Plaintiff in Error, p. 6). Hence the instrument is to be construed strictly against the bank (p. 7, *supra*). The "undersigned" can not be presumed to have intended that it would apply to paper non-contractually obtained by the bank, although for the moment geographically "in" its premises, and physically "under its control." Even if such an agreement might attach in a case like Brandao *v.* Barnett, it could not without violating all principles of good faith be applied to a case like Petrie *v.* Myers.

To illustrate, let us suppose that the Abilene bank had sent the notes by a special messenger; that he had come into defendant's office and asked that they be discounted; that defendant's clerk had asked, as would be natural, for a look at the notes; that they had been handed to him, and that on examination he had concluded to reject them. The notes would then indeed be geographically "in said bank." They would be in the grip of an agent of the bank, behind a metal screen, and physically out of the power of the Abilene messenger to reclaim. Were they in the bank or under its control within any admissible construction of this agreement, so that the messenger would not have the right to demand them back again and take them to some other correspondent for discount? Like a diner handling the knives and forks of a hotel, has not the bank a mere custody as distinguished from the possession of the notes? And is not the case precisely the same here, where the letters are entrusted to the mail instead of to a messenger?

To illustrate again, let us suppose that the notes had been stolen, or diverted by a forged indorsement, or had blown in through the window, and had thus come into the defendant's physical possession, but with notice of the Abilene rights. Does any admissible construction of the agreement permit the defendant to say "We are indeed not *bona fide* holders and cannot claim to *own* the notes, but we shall *hold* them as pledgees under your agreement because they have got into our control?"

In short, does the agreement mean "We are to have a lien upon any paper we can lay our hands on, whether we obtain it by fair means or foul"?

Assuming that the words "or otherwise" are broad enough to cover securities that are in the bank neither by way of deposit nor by way of collateral, still the words are to be construed in the light of the rule *nosc itur a sociis*. They cannot reasonably be construed to add to the cases of deposit and collateral security any case that is not contractual in its nature—that does not involve a contract upon which the minds of both parties to the agreement, or of others with whom they are in privity, have met.

III.

There was no other agreement under which the Hanover Bank had the right to retain the notes.

It did not claim even on the second trial to have relied on any describable agreement or promise,

tacit or express, except the paper of November 27, 1903 (Record, No. 163, pp. 18-19). Evidently that paper was its sole reliance. Had this not been so, it would doubtless have wired, instead of mailing, the notice that it claimed to hold the notes as general collateral.

Nor is it able now to spell out any agreement upon which it would have had a right to rely.

To constitute an agreement there must be a proposal and acceptance.

The first proposal was that the notes be re-discounted. This was rejected.

The subsequent proposal was in transit at the time of the failure, and was therefore never accepted. When the Abilene bank failed, its property rights passed by operation of law to the present plaintiff as its receiver. Among the circumstances which revoke an offer before acceptance is "bankruptcy of one of the parties, which transfers all his property to trustees" (John D. Lawson, in 9 Cyc., 293, citing Meynell *v.* Surtees, 25 L. J. Ch., 257, 262). In the case cited an offer of a "way-leave" was made to a railroad company, but before the offer was accepted the offerer became a bankrupt. Lord Cranworth said, "I am perfectly satisfied in point of law and have no hesitation in saying that if Mr. Ord had been the owner * * * that paper falls to the ground entirely by his bankruptcy; because all his interest was transferred to somebody else", etc. Putting it another way, a contract is not made until the proposal is accepted, and a proposal to subject property to a lien cannot result in anything effectual when the property has passed to a third party before the proposal has reached the person to whom it is made. The rights of the general creditors

had then attached (see Scott *v.* Armstrong, 146 U. S., at p. 511).

Nor did this unaccepted proposal include the pledging of these four notes as general collateral. It was that the Hanover bank reconsider and allow the discount, or "we *will send* our B/P with collaterals *attached.*" The alternative offer must relate to some papers then in Texas, not New York. This our learned adversary overlooks.

The Hanover bank made no counter-proposal, but simply wrote its correspondent, first, that it was impounding the four notes under a claim of general lien, and second, that it was making a temporary loan of $3,500. The first it had no right to do. The second was merely a method of entering part of an overdraft which it chose to pay. Neither notice reached Abilene before the rights of the general creditors had attached.

Its main reliance now seems to be on the theory that the New York Life Insurance Company check of $3,825.45, which was issued on January 11 and caused the overdraft, was issued in expectation of meeting it with the two notes sent January 9 and 10. Assume this to be true. But the expectation was that these notes would be discounted. No doubt as to this was ascertained. They were sent for no other purpose. Hence the Hanover bank could not connect the transactions together except by accepting the proposition to discount these two notes, and paying the check out of the proceeds; or if it preferred to do so, it could have discounted the two later notes instead.

It could not pay the check and hold any of the notes, except by discounting them. In other words,

it could not pay the check and thus immediately create a *secured* liability, payable *on demand*. It could throw out the check, or else pay it and accept security payable later in the year. The latter course would have been accommodating, and it would have been safe as things turned out.

Its position as a reserve bank gave it no privilege to tamper with its correspondent's rights. If its correspondent was solvent, even an unsecured overdraft would have been harmless. If its correspondent was insolvent, then the creditors were the real parties in interest, and its duty was to preserve their equality as far as possible, and not prefer the New York Life Insurance Company.

Had the notes been discounted, the Abilene bank would have obtained thereby nearly $10,000 cash with which it would have been at once credited. Over $6,000 it could have forthwith used for any of its purposes, having with the balance provided for the New York Life Insurance Company draft. *Non constat* that it would not have been able thus to avert insolvency. It would indeed have remained contingently liable as indorser; but this liability, as the event has showed, would have amounted to nothing in the case of three at least of the four notes.

What the Hanover bank now asks is in effect to be put where it would have been if it had accepted the request to discount instead of rejecting it—to imply an agreement contrary to the fact—an agreement which was proposed, but which its own mistake of law and error of judg-

ment and desire to gain a greater advantage prevented. This the court cannot do—and especially after a failure that may have been caused by the course which complainant elected to take.

The fact that the Hanover Bank saw fit to enter a loan of $3,500 on its books does not alter the legal significance of the transaction. The transaction was not a loan, but something quite different—the payment of a draft by the drawee, although the draft was unaccepted and no funds had been provided by the drawer with which to meet it, or collateral with which to secure the payment. Such a payment is a not unusual courtesy, and it raises a liability by the drawer to the drawee, but creates no lien.

Having no funds and no collateral, complainant's proper course was to refuse payment of the New York Life Insurance Company draft, and telegraph its correspondent to that effect. This might have elicited some agreement that would have enabled the draft to be taken up. If not, then the result would have been to make the insurance company an unsecured creditor, and leave it to prorate with the Abilene bank's other unsecured creditors.

By taking up the draft, complainant merely stepped into the shoes of the insurance company, and became an unsecured creditor itself.

IV.

There is no question of set-off, legal or equitable, properly in the case.

Set-off is a doctrine which applies as between two claims each for a sum of money. The receiver's demand for relief shows his action to have been one of replevin (Record No. 163, pp. 7-8; No. 164, p. 5; N. Y. Code Civ. Pro., §§ 1718, 1726, 1730; 2 Abbott's Forms of Pleading, p. 869); and hence it is obviously not subject even to a statutory counterclaim, for a sum of money can not be deducted from the possession of four notes (Moffat *v.* Van Doren, 4 Bosw., 609; N. Y. Code Civ. Pro., § 501; 1 Nichols' N. Y. Practice, 972, and cases cited; Dinan *v.* Coneys, 143 N. Y., 544). The judgment reversed was for a sum of money, because the notes had been parted with or returned to the receiver, *pendente lite.*

Equitable as well as legal set-off is a doctrine applicable only to pecuniary cross-demands. Of that nature was Scott *v.* Armstrong, 146 U. S., 499.

The bill in No. 164 is not properly a bill for an equitable set-off, but a bill to declare certain notes to have been subject to a quasi-contractual lien that would have been enforceable in equity but not at law.

V.

There is no equity in the bill in No. 164.

If the Hanover Bank had any remedy it had an adequate remedy by defending the receiver's action at law, in which respect the case differs from Scott *v.* Armstrong, *supra*. Its learned counsel fully protected its interests, and this bill which he subsequently filed *ex majori cautela*, though prudent, was unnecessary, and properly dismissed as devoid of equity (pp. 8-9). If there was any agreement, express or implied, giving the bank the right to claim a lien on these four notes, it was a right not depending upon any distinctively equitable theory, in the jurisdictional sense of that term. Hence the merits of the controversy are to be decided upon the record in No. 163, which we have already fully discussed.

For the foregoing reasons it is respectfully submitted that the judgment and decree should be affirmed.

EDWARD B. WHITNEY,
FRANCIS F. OLDHAM,
Of Counsel for Defendant-in-Error
and Appellee.

HANOVER NATIONAL BANK OF NEW YORK *v.* SUDDATH, RECEIVER OF AMERICAN NATIONAL BANK OF ABILENE.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 12. Argued April 20, 1909.—Decided November 29, 1909.

When a bank refuses to do the particular thing requested with securities delivered to it for that purpose only, it is its duty to return the securities and no general lien in its favor attaches to them.

The fact that a bank has in its possession securities which were sent to it for a particular purpose and which it is its duty to return to the sender, does not justify its retaining them for any other purpose under a banker's agreement giving it a general lien on all securities deposited by the sender.

A banker's agreement giving a general lien on securities deposited by its correspondent will not be construed so as to give it a broad meaning beyond its evident scope and in conflict with the precepts of duty, good faith and confidence necessary for commercial transactions; nor will a printed form prepared by the banker be so extended by the construction of any ambiguous language.

In this case it was held that the retention by a bank of securities for a purpose different from that for which they were sent by its correspondent could not be predicated on the consent of the latter, and that inaction of the correspondent could not be construed as consent.

149 Fed. Rep. 127, affirmed.

THE facts are stated in the opinion.

Mr. Percy S. Dudley for plaintiff in error:

Plaintiff in error had the right to retain the notes under the express terms of the collateral agreement. *Auten* v. *Bank*, 174 U. S. 125, 145; *Hiscock* v. *Varick Bank*, 206 U. S. 28, and cases cited. As to scope of words "or otherwise" see *Farr* v. *Nichols*, 132 N. Y. 327. As bailee of the notes the Hanover Bank had a lien on them. Benjamin on Sales, § 2, Am. note. As to construction of the agreement, see *Gillet* v. *Bank*, 160 N. Y. 549; *Sattler* v. *Hallock*, 160 N. Y. 291, 297; *Church* v. *Hubbart*, 2 Cranch, 233; *Hutchinson* v. *Manhattan Co.*, 150 N. Y. 250; 21 Am. & Eng. Ency. Law, 2d ed., 1016. Plaintiff in error had the right to retain the notes by virtue of its bankers' lien. 1 Daniel's Neg. Inst., 5th ed., 342; 1 Morse on Banks, 4th ed., § 324; *Reynes* v. *Dumont*, 130 U. S. 354, 390; *Biebinger* v. *Continental Bank*, 99 U. S. 143; *Bank of Montreal* v. *White*, 154 U. S. 660; *Petrie* v. *Myers*, 54 How. Pr. 513, distinguished, and see *Armstrong* v. *Chemical Bank*, 41 Fed. Rep. 234; *Continental Bank* v. *Weems*, 60 Texas, 489.

The receiver of the Abilene Bank took the assets subject to the claim of the Hanover Bank and obligation existing when he took possession. *Scott* v. *Armstrong*, 146 U. S. 499; *Rankin* v. *City Nat. Bank*, 208 U. S. 541.

The Hanover Bank had the consent of the Abilene Bank to retain the notes. Mailing the letters was a delivery and had the Abilene Bank mailed cash it would have been subject to lien of Hanover Bank although not delivered until after the failure; it is so also as to these notes. *McDonald* v. *Chemical Nat. Bank*, 174 U. S. 610; *Ruggles* v. *Am. Cent. Ins. Co.*, 114 N. Y. 415.

Mr. Edward B. Whitney, with whom *Mr. Francis F. Oldham* was on the brief, for defendant in error:

The Hanover Bank had no general lien on the notes involved. *Brandao* v. *Barnett*, 12 Cl. & Fin. 787; Story on Agency, § 381; 1 Morse on Banks, 4th ed., 597; *Bank of Met.*

v. *N. E. Bank*, 1 How. 234, 239; *Leese* v. *Martin*, L. R. 17 Eq. 224, 235; *Reynes* v. *Dumont*, 130 U. S. 354. These and other cases all hold that where securities are sent for a specific purpose the recipient cannot hold them for any other purpose but must return them. 1 Jones on Liens, 2d ed., 244; *Lucas* v. *Dorrien*, 7 Taunt. 278; *Petrie* v. *Myers*, 54 How. Pr. 513; *Bank of Montreal* v. *White*, 154 U. S. 660. The bank becomes a trustee to apply the securities as directed by the sender. *Libby* v. *Hopkins*, 104 U. S. 309.

The Hanover Bank had no lien on the notes under the agreement and there was no other agreement or consent under which that bank could hold them. There was no proposal or acceptance as to the collateral loan and payment of overdraft. 9 Cyc. 293; *Meyrell* v. *Surtees*, 25 L. J. Ch. 257, 262; *Scott* v. *Armstrong*, 146 U. S. 511.

MR. JUSTICE WHITE delivered the opinion of the court.

The predecessor of the present receiver of the American National Bank of Abilene, Texas, sued, in April, 1905, to recover from the Hanover National Bank of New York four promissory notes or their value.

We shall refer to the corporations as the Abilene Bank and the Hanover Bank.

At the trial, under instruction, there was verdict for the Hanover Bank, and the judgment thereon was reversed. *Van Zandt* v. *Hanover Nat. Bank*, 149 Fed. Rep. 127. In conformity to the opinion of the Circuit Court of Appeals, on the new trial a verdict was directed in favor of the receiver, and to reverse the affirmance of that judgment (*Hanover Nat. Bank* v. *Suddath*, 153 Fed. Rep. 1021) this writ of error is prosecuted.

The facts are these: Prior to November, 1903, the Abilene Bank was a correspondent of the Hanover Bank, and had an account with the latter. The credit of this account was principally made up by the proceeds arising from the rediscount-

ing by the Hanover Bank of commercial paper for account of the Abilene Bank. On November 27, 1903, the Abilene Bank signed an agreement concerning the right of the Hanover Bank, under conditions stated, to attribute to the payment of debts due it by the Abilene Bank securities in its hands belonging to the Abilene Bank. In January, 1905, the Hanover Bank was contingently responsible for commercial paper, aggregating probably sixteen or seventeen thousand dollars, which it had rediscounted for the Abilene Bank, and upon which the latter bank was ultimately liable.

On January 9, 1905, the Abilene Bank transmitted by mail to the Hanover Bank a note of the Hayden Grocery Company for $2,000, drawn to the order of the Abilene Bank and by it indorsed, the letter stating that the note was sent for discount and credit. On the next day—the tenth—the Abilene Bank also transmitted by mail a note drawn by R. H. Logan and W. R. Logan to its order, and by it indorsed likewise, with a statement that it was sent for discount and credit. On the twelfth of the same month the Abilene Bank again transmitted to the Hanover Bank for discount and credit two other notes, one drawn by L. W. Hollis for $3,500, and indorsed, as were the previous notes and a note of C. B. and W. F. Scarborough, for $1,500 likewise so indorsed, the letter of transmittal yet again stating that they were sent for discount and credit.

The Hayden Grocery Company and the Logan notes, forwarded on the ninth and tenth of January, reached the Hanover Bank on the fourteenth; and on that day it telegraphed to the Abilene Bank, declining to discount the notes, and by a second telegram said: "Referring to previous dispatch transfer or ship currency," which, according to the counsel for the Hanover Bank, meant to call upon the Abilene Bank either to transfer a credit from some other bank or ship currency direct. It is not shown that any reply, either by telegram or letter, was made to the messages thus sent on the fourteenth. The notes forwarded on the twelfth reached the Hanover Bank on the sixteenth, and the latter at once tele-

graphed, "Not satisfactory," and confirmed the telegram by a letter, saying: "We are not discounting inclosures for you, but hold same as collateral to your indebtedness to us." The Abilene Bank did not reply by telegram but on the same day wrote to the Hanover Bank as follows:

"We have just received your wire. The rediscounts we sent you were mostly renewals and in every instance 'good as gold.'

"Since the drop in cotton, collections are at a standstill, and our clients expect us to stay with them, and we are obliged to ask the same indulgence from our correspondents.

"Should you prefer, we will send our B/P with collaterals attached.

"We trust you will accord us the leniency asked for."

On the morning of January 17, 1905, there stood on the books of the Hanover Bank to the credit of the Abilene Bank the sum of $616.15. On that day a check on the Hanover Bank, dated January 11, 1905, drawn by the Abilene Bank for the sum of $3,825.45, payable to the New York Life Insurance Company, as also some small checks, passed through the clearing house. Upon attention being directed to the overdraft which thereby resulted a telegram was sent to the Abilene Bank, referring to the previous letters and telegrams, and asking that bank what it had done. No reply having been received before the close of business on that day, the vice-president of the Hanover Bank, after examining the written agreement to which we have previously alluded, allowed the overdraft to stand, and to cover the same made an entry of a loan of $3,500 to the Abilene Bank, which was placed to the credit of that bank, and after absorbing the overdraft, left to its credit the sum of $63.74. On the same day the Hanover Bank wrote to the Abilene Bank, saying: "As your account showed overdrawn to-day over $3,000, have made you a temporary loan of $3,500 against collateral in our hands." On the next day (January 18) the Abilene Bank closed its doors.

It is to be observed that of the letters, the one by the Hanover Bank, written on the seventeenth of January, and the one written on the previous day by the Abilene Bank, did not reach their destination until after the failure of the Abilene Bank.

Thereafter Richard L. Van Zandt was appointed receiver, and, as we have said, commenced this action to recover the possession of the four notes which had been transmitted to the Hanover Bank as above stated, or the value of such notes, and in the course of the action the proceedings took place to which we have at the outset referred. The ground relied upon for recovery was that as the notes had been sent to the Hanover Bank for discount for the account of the Abilene Bank, upon the Hanover Bank refusing to discount them that bank had no claim whatever upon the notes, and had no right to apply them as collateral to the payment of the voluntary overdraft which had been allowed on the seventeenth of January, and thus obtain a preference to the extent of the appropriation over the general creditors of the Abilene Bank. It suffices to say that the defense of the Hanover Bank controverted this contention, and asserted that the appropriation of the notes was justified under its general bankers' lien or under the terms of the special agreement of November 27, 1903. During the pendency of the action the Hanover Bank collected three of the notes, deducted from their proceeds the sum of $3,725.86 then due, and paid to the receiver the balance and also delivered to him the uncollected note, being the note of R. H. Logan and W. R. Logan, which had been transmitted to the Hanover Bank on January 10 and was by it received on the fourteenth.

It is contended that the appellate court erred in affirming the ruling of the Circuit Court, directing a verdict for the receiver. The grounds for this contention are that the evidence showed that the Hanover Bank had the right to retain the four notes or the balance of their proceeds, by virtue of its general bankers' lien; and, if not, as a result of the express

provisions of the agreement of November 27, 1903; and, in any event, by the authority or consent of the Abilene Bank. Without stopping to consider whether the third contention is not really involved in the first two, we pass to their consideration in the order mentioned.

1. *Was there a right of retention in the New York bank by virtue of its general bankers' lien?*

The rulings of this court foreclose this question, since they conclusively establish that a general lien in favor of a bank cannot attach to securities which are delivered to it in order that it may do a particular thing with them, and that when it refuses to do that thing the duty to return exists. The general subject was elaborately considered and the authorities were fully reviewed in *Reynes* v. *Dumont*, 130 U. S. 354. In that case securities had been sent to bankers for a specific purpose. That purpose having been accomplished, the securities were permitted to remain in the custody of the bankers as depositaries, because they were in a good market and a place convenient for procuring loans, and because the expressage upon their return would have been great. The right to a general bankers' lien upon the securities was denied. Such a lien, it was said (on p. 390), would arise "in favor of a bank or banker out of contract expressed, or implied from the usage of the business, in the absence of anything to show a contrary intention." Ordinarily, it was declared (p. 391) the lien would attach in favor of a bank upon securities and moneys of the customer deposited in the usual course of business, etc. It was, however, expressly declared not to "arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien." *Biebinger* v. *Continental Bank*, 99 U. S. 143, was one of the authorities cited in the opinion. In that case it appeared a deed had been deposited with the bank as collateral security for the customer's current indebtedness

and discounts. After payment of this indebtedness and a temporary suspension of dealings, the customer incurred new indebtedness to the bank, but as it did not appear that the money was loaned or debt created on the faith of the deposit of the deed, the bank's claim of a lien thereon was denied. *Bank of Montreal* v. *White*, 154 U. S. 660, is also a pertinent decision. Without elaborating the issues which were there involved, it suffices to say that in an action to recover upon a promissory note, in order to escape the contention that it was not an innocent holder the bank contended that before the note was sent to it for discount the sender was under a promise to furnish security for advances to be made, and therefore the rights of the bank as an innocent holder were to be determined by the state of its knowledge at the time the note was received, although the discount was declined, and not by the state of knowledge existing when at a subsequent date the note was actually discounted. In disposing of a contention that the trial court had committed error in not giving an instruction which the bank asked in accord with its contention as just stated, the court said:

"There can be no pretense in this case that the note in suit was ever actually delivered to the bank as collateral security for past or future indebtedness. In the letter transmitting it, the bank manager was asked to discount it and place the proceeds to the credit of the manufacturing company. In that event, the 'overdraft kindly allowed on Friday,' was to be charged against the credit, but it is nowhere, even in the remotest degree, intimated that if the discount was declined the note might be kept as collateral. The charge asked and refused was, therefore, wholly immaterial, and the judgment cannot be reversed because it was not given."

2. *Was the Hanover Bank entitled to retain the notes under the terms of the agreement of November* 27, 1903?

The material portions of the agreement are as follows:

"For and in consideration of one dollar [&c.], the undersigned agree with said bank that all bills of exchange, notes,

checks, and the proceeds thereof, and all other securities, money and property of every kind owned by the undersigned, or either or any of them, or in which they, or any or either of them, have any interest deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control, as collateral security for loans or advances already made or hereafter to be made to or for account of the undersigned, by said bank, or otherwise, may be held, collected and retained by said bank until all liabilities, present or future, of the undersigned, or any or either of them, due or not due of every kind to said bank, now or hereafter contracted, shall be paid and fully satisfied."

For the Hanover Bank it is contended that although the notes were not in its possession as collateral security for any debt due it, nevertheless, as it had the physical possession of the notes and they were not unlawfully in its hands, it had under the agreement the power to make the advance to cover the overdraft and to attribute, without the consent of the Abilene Bank, the notes in question as collateral security for the loan which was made. The construction upon which this proposition is rested gives to the agreement the most latitudinarian meaning, and besides, in effect, depends upon considering one or more clauses separately from their context, thereby affixing to them a significance to which they would not be entitled if considered in connection with the text in which they are found. To illustrate: It is said the words which give the power to the Hanover Bank to appropriate any securities "deposited with said bank, or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control," are broad enough to embrace securities in the hands of the Hanover Bank, without considering how they came into the possession of that bank or without taking into account whether that bank had any claim whatever aside from the agreement in question, and without considering whether it was under the plain duty to

return the securities upon demand, and had no right to require the performance of any act or duty by the Abilene Bank in respect thereto. But this broad interpretation is, we think, unreasonable, since it cannot be assumed, if there be room for implication to the contrary, that the agreement was intended to confer the right upon the Hanover Bank to appropriate securities merely because such securities had come into its physical control and with the obligation to return on demand. We say this, because it is manifest that to attribute the broad meaning claimed would be in conflict with the precepts of duty and good faith, and would be destructive of that confidence and fair dealing so essentially necessary in commercial transactions. In the light of these considerations we think the language relied upon should not receive the all-embracing meaning sought to be attributed to it, but should be limited so as to cause the same to embrace only property deposited with the Hanover Bank, "or which may hereafter be deposited with said bank, or which may be in any wise in said bank, or under its control," under circumstances and conditions which gave to that bank by operation of law or otherwise some right to retain such property for a particular purpose. And irrespective of the meaning which we attribute to the language relied upon, when independently considered, we are of opinion that the want of merit in the construction given to the agreement by the Hanover Bank is clearly demonstrated when the context is brought into view. That is to say, we consider that the provision of the agreement to which we have just referred is qualified by the language which follows it, viz., "as collateral security for loans or advances already made or hereafter to be made to or for account of the undersigned, by said bank, or otherwise." In other words, the provision just quoted, we think, must be considered as limitative in its character and as controlling, therefore, the previous stipulations, thus confining the right to apply securities in the possession of the Hanover Bank to such as had come into its possession or control for the purposes de-

scribed. The contention that the words "or otherwise" deprive the provision in question of its limitative effect is, we think, clearly without merit, since that view cannot be upheld without causing the words in question to dominate and destroy the meaning of the agreement as derived from a consideration of all its provisions. Particularly is this the case, as those words are susceptible of a meaning in harmony with the context; that is to say, may be held to give the right to retain securities under the circumstances stated, even although the loan may not have been made directly to the Abilene Bank, as, for instance, where the securities belonging to the Abilene Bank came into the possession of the Hanover Bank as the result of a rediscounting of paper of the Abilene Bank. Conclusive as we think are the reasons just stated, they are additionally fortified by the considerations which the lower court so cogently pointed out in the opinion by it announced, that is, that the contract was one prepared by the Hanover Bank and embodied in a printed form in general use by that bank, and therefore should have expressed its purpose beyond doubt and not ambiguously if the language in question was intended to convey the far-reaching meaning now sought to be attributed to it.

3. *Was there otherwise a right of retention by the authority or consent of the Abilene Bank?*

By its answer, the Hanover Bank based its claim of right to retain the notes in question solely upon its general bankers' lien and the written collateral agreement. The letters to the Abilene Bank, coupled with the statement of its vice-president, make plain the fact that the sole reliance of the Hanover Bank in asserting a claim upon the notes was, in reality, the written agreement. Thus, by its communication of January 12, 1905, confirming the telegram advising that the Logan and Hayden notes would not be discounted, the Hanover informed the Abilene that it held the notes as collateral for the indebtedness of the Abilene. Again, on the seventeenth of the same month, following the allowance of the overdraft,

the New York bank wrote: "As your account showed overdrawn to-day over $3,000 we have made you a temporary loan of $3,500 against collateral in our hands." And the belief of the vice-president, that the Hanover Bank was entitled to hold the four notes as collateral which led to the allowance of the overdraft, is clearly shown by the record to have been induced by the terms of the collateral agreement, which he at the time inspected. It may well be that the check of January 11, 1905, for $3,825.45 was issued in the expectation that it would be paid from the proceeds of the Logan note of $2,000 and the Hayden note of $3,000, forwarded for discount on January 9 and 10. But these and the subsequent notes were not sent to be held as collateral security, but to be discounted. The Abilene Bank had been notified by telegram not only that the Logan and Hayden notes would not be discounted, but that it should either transfer credits from other banks or ship currency. The information plainly conveyed by this notification was that checks drawn upon the faith of the discount of the notes referred to must be protected with funds to be furnished. In reason, the Hanover Bank was not entitled to act upon the assumption that the inaction of the Abilene Bank was equivalent to a request to pay the drafts as presented and to hold as collateral the notes which had been sent for discount. The Hanover Bank should, on the contrary, in view of the action of the Abilene Bank, have assumed the possibility that funds could not be supplied, and that the Abilene Bank might therefore be unable to meet its paper and be compelled to cease business. It is apparent that the Hanover Bank in allowing the overdraft did not act upon the assumption that the possession merely of the notes justified its reliance upon them as a security for the advance. We say this because the record leaves no doubt that the device of a temporary loan in order to secure the payment of the overdraft was resorted to upon the faith of rights supposed to inhere in the written agreement. There is no basis, therefore, for the contention that from the circumstances of the

overdraft and the possession of the notes a right of retention existed created by authority or consent of the Abilene Bank.

Affirmed.

HANOVER NATIONAL BANK OF NEW YORK, APPELLANT, *v.* SUDDATH, AS RECEIVER OF AMERICAN NATIONAL BANK OF ABILENE (NO. 2).

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 13. Argued April 20, 1909.—Decided November 29, 1909.

Where a bank, after refusing to discount paper sent to it by the insolvent for that purpose, has retained the paper, it cannot, as against general creditors, set off against that paper, or its proceeds, the bankrupt's overdraft although made after such refusal and pending the retention of the paper.

153 Fed. Rep. 1022, affirmed.

THE facts are stated in the opinion.

Mr. Percy S. Dudley for appellant:

The Hanover Bank was entitled in equity to set off the advance made against the notes which it held. *Scott* v. *Armstrong*, 146 U. S. 499; *Carr* v. *Hamilton*, 129 U. S. 252; *Scammon* v. *Kimball*, 92 U. S. 362; Bispham's Equity, 7th ed., 1905, § 327; 2 Bolles' Modern Law of Banking, 742; *Rolling Mill* v. *Ore & Steel Co.*, 152 U. S. 596, 615; *Schuler* v. *Israel*, 120 U. S. 506; *Armstrong* v. *Chemical Bank*, 41 Fed. Rep. 234; *Bank* v. *Massey*, 192 U. S. 138. In New York the set-off would have been allowed under the Code. *Fera* v. *Wickham*, 135 N. Y. 223; *DeCamp* v. *Thompson*, 159 N. Y. 444; *Empire Feed Co.* v. *Chatham Bank*, 30 App. Div. 476; *Thompson* v. *Kessel*, 30 N. Y. 383; *G. & H. Co.* v. *Hall*, 61 N. Y. 226, 236; *Brown* v. *Buckingham*, 21 How. Pr. 190.

Mr. Edward B. Whitney, with whom *Mr. Francis F. Oldham* was on the brief, for appellee:

There is no question of set-off, legal or equitable, in the case, nor is there any equity in the bill. The receiver's case was really one in replevin. N. Y. Code of Civ. Pro., §§ 1718, 1726, 1730, and see also § 501; 2 Abbot's Form of Pleading, 869; *Moffatt* v. *Van Doren*, 4 Bosw. 609; 1 Nichols N. Y. Prac. 972, and cases cited; *Dinan* v. *Coneys*, 143 N. Y. 544.

MR. JUSTICE WHITE delivered the opinion of the court.

This is an outgrowth of a litigation between the same parties, which we have just decided in case No. 12, and we shall therefore refer to the banks as we did in No. 12, the one as the Abilene Bank and the other as the Hanover Bank. On October 11, 1906, in reversing the judgment entered in that action on the first trial in favor of the Hanover Bank, the Circuit Court of Appeals observed (149 Fed. Rep. 127, 130):

"The contention for the defendant in error that it was entitled to set off or counterclaim the indebtedness owing to it by the Abilene Bank when the latter became insolvent, is wholly untenable. Such a defense is not available in an action at law for conversion, and, if the defendant had any right of equitable set-off, this should have been asserted by a bill in equity."

On November 20, 1906, as we have seen, at the second trial of the action at law the court directed the jury to find a verdict in favor of the Abilene Bank. A few days afterwards the bill in this cause was filed on behalf of the Hanover Bank, the receiver of the Abilene Bank being the defendant, the suit, it is intimated, having been commenced because of the statement made by the Circuit Court of Appeals in the passage from its opinion above quoted. The course of dealing between the two banks, the execution of the written agreement, the forwarding of the four notes for discount, the refusal to discount, the overdrawing by the Abilene Bank of its account

with the Hanover Bank, the allowance of the overdraft and the temporary loan of $3,500, the collection of three of the notes and retention of a sufficient sum to cancel the indebtedness created by the overdraft and the surrender of the balance to the receiver, together with the uncollected note, were alleged in the bill substantially as we have stated them in the opinion in No. 12. The commencement and prosecution of the action at law was next averred and the various steps in that litigation were detailed, culminating in an averment of the rendering upon the second trial of the action at law of a verdict in favor of the Abilene Bank for $3,725.86. It was charged that the receiver was threatening to enter judgment upon the verdict. Averring a right in equity to offset the indebtedness due to it by the Abilene Bank on January 18, 1905, against the demand of that bank or its receiver for the four notes or their proceeds, the Hanover Bank prayed that its set-off might be allowed against the receiver, and that he be enjoined from further prosecuting the action at law. A demurrer to the bill was sustained and a dismissal was entered. The decree was affirmed by the Circuit Court of Appeals (153 Fed. Rep. 1022), and the cause was then brought here.

The decision just announced in case No. 12 establishes the want of equity in the bill. The mere possession of the notes by the Hanover Bank after its refusal to discount them did not justify that bank in relying upon the notes as collateral security for the indebtedness which arose from the voluntary payment of the draft drawn by the Abilene Bank upon the Hanover Bank, when there were no funds in the latter bank to meet the draft. The notes forwarded January 9 and 10 were sent to be discounted, and the draft drawn on January 11, which created the overdraft, was presumably drawn upon the faith that those notes would be discounted, and that the draft would be paid out of the proceeds. As matter of fact, however, the Hanover Bank recouped itself out of the proceeds of but one of the notes, together with the proceeds of notes

subsequently forwarded to it. In view of the fact that the Hanover Bank not only notified the Abilene Bank that the notes would not be discounted, but also by telegram in effect demanded that the Abilene Bank should forward funds to meet its drafts, the assumption cannot be rightfully indulged that the Hanover Bank allowed the overdraft in the belief that the silence of the Abilene Bank signified that it expected the draft to be paid, and that to enable the payment the Hanover Bank might use the notes sent for discount as it saw fit. It is not contended that there was an express agreement between the parties that the draft which created the overdraft should be paid, and that the funds should be realized in the mode pursued by the Hanover Bank. Considering the transaction either from the standpoint of the forwarding of the notes for discount and the making of the draft, or from the standpoint of the sending of the notes for discount, and the failure of the Abilene Bank to forward funds or to promptly make known to the Hanover Bank its wishes in the matter, we are of the opinion that the circumstances of the transaction were not such as to raise the presumption of agreement for a set-off available as against the general creditors. *Scott* v. *Armstrong*. 146 U. S. 499.

Affirmed.